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LAW OF SPECIFIC RELIEF
IN INDIA AND ENGLAND
BEING AN ANALYTICAL COMMENTARY ON THE
SPECIFIC RELIEF ACT.

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of Property Act, Limitation Act, Easements, Principles
of Equity, Evidence Act, etc., etc.*

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REVISED AND BROUGHT UP-TO-DATE

BY

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INTRODUCTION.

The law ought to assure me everything which is mine without forcing me to accept equivalents, even though I have no particular objection to them:—Bentham.

Specific Relief has been explained as relief in *specie*. It is a remedy which aims at the exact fulfilment of an obligation.

A student of jurisprudence knows that civil justice consists in the enforcement of rights, and that a person any of whose rights are infringed can go to a Court of Law for a relief and seek a remedy, if he has one. The general remedy at law, the remedy which is most common consists in awarding pecuniary compensation; Court will compel the defendant to give up the pecuniary value of some benefit which he has wrongfully obtained, or to pay the pecuniary value of goods which he has wrongfully taken or detained.

As distinguished from this general remedy which consists in pecuniary compensation, there are other remedies which aim at the exact fulfilment of obligations and the complete enforcement of rights.

In England, at common Law, the only remedy by which rights were generally enforced was the round and 'perhaps' simple method of giving compensation in money; thus for instance, no remedy save damages could be obtained for breach of a contract. The plaintiff had to rest content with the pecuniary compensation. Equity which was administered solely in the Chancery courts came forward on the ground of inadequacy of the damages, and enforced what is called specific performance, that is ordered a party to do the very act which he was under an obligation to do. So also, enforcement of Trusts, Injunctions, Rescission of contracts, cancellation of instruments etc., were remedies peculiar to the Chancery

courts. These and some other remedies which were peculiarly equitable are embodied in the Specific Relief Act; they are called *specific* in as much as they lie outside the ordinary order of legal redress.

A contracts with B to buy a picture by Romney, a dead painter of great repute. B refuses to deliver the picture. Pecuniary compensation cannot do justice to A for what he really wants is the picture itself; the relief which he wants is that B may be compelled to perform his obligation.

B rings bells and makes other unnecessary noises so near A's house as to interfere materially with his physical comfort; an order of the court restraining B from making the noise complained of, that is, an injunction would in such a case be an indispensable remedy.

A is in possession of certain property; B alleging that he is the owner of the property, requires A to deliver it to him. The remedy which A must have is not pecuniary compensation for B's conduct, but a Declaration from the court that he A is the person rightfully entitled to the property; A wants that the cloud on his title may be dispelled by such a Declaration.

These are some of the cases where an aggrieved party is granted "specific relief", that is, the very thing which he in law was entitled to and not merely an equivalent in the form of pecuniary compensation.

The two more important remedies under this Act are by

(From the abstract of the Proceedings of the Council of the Governor-General of India—23rd November 1855)

The Hon'ble Mr. Hobhouse moved for leave to introduce a bill to define and amend the law relating to certain kinds of relief. He said that the first thing he must do was to apologise to the council for the want of explicitness in the wording of the motion. He understood that some of his Hon'ble Colleagues thought he was going to propose a Poor Law and others that it had reference to the movement of troops. But that was not the case. This Bill had nothing to do with the relief of Taluqdars or other distressed members of the Community, nor with the change of sentries, but was intended to deal with that which was well-known to lawyers under the technical term of "relief", namely, the remedy which was granted by courts of justice to suitors.

way of specific Performance of contracts and by way of Injunctions for the prevention of wrongs ; Kind of relief under the Act. other sorts of Relief too, are included in the Act, such as taking possession of certain property and delivering it to a claimant, Rectification of instruments, Rescission of contracts, Cancellation of instruments, Declaring the rights of parties, appointment of Receivers and Enforcement of Public Duties. The Act covers the cases of obligations both, contractual as well as Paramount.

Specific performance of a contract which as already observed is one of the two more important branches of specific relief administered in India consists in "ordering a party to do the very act which he is under an obligation to do". Specific performance can be only of a valid contract-

an agreement enforceable at law. A contracts with B to purchase from him a house for Rs. 10,000. A is ready and willing to pay Rs. 10,000 and asks B to execute a sale-deed. B refuses to complete the sale and to give possession of the house to A. A is entitled to a decree directing B to convey the house to A on his paying the purchase-money-a decree for specific performance for this would be the only remedy that can secure to A the real benefit of his covenant. Merely giving pecuniary compensation to A would be, if anything, an unsatisfactory and an inadequate relief. B will therefore be compelled to perform his contract in *specie*.

Specific performance then "consists in the contracting party's exact fulfilment of the obligation which he has assumed—in his doing or omitting the very act which he has undertaken to do or omit." Law does not allow a man to depart from his contract at his pleasure ; it will not leave the party with whom the contract has been broken to the only chance of recovering damages, but will insist, when it can, on the literal performance of the contract.

The mere existence of a contract however is not in itself sufficient to bring about the interference of the court. There "

may have been conduct on the part of the plaintiff such as unnecessary delay, acquiescence or some breach of duty which may disentitle him to the relief of specific performance which he seeks ; again there may be other circumstances¹, which will be immediately referred to, having regard to which a court may in its discretion decline to give the specific relief. There is also another rule of equity which must not be lost sight of, and it is this that when compensation in damages furnishes an adequate remedy—a remedy which the court in its discretion thinks is complete and satisfactory, specific performance will not be granted. ✓

The general rule² may now be stated that court will grant specific performance of contract—

When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done ;

When pecuniary compensation, for the non-performance of the act agreed to be done, would not afford adequate relief ; or ✓

When it is probable that pecuniary compensation cannot be got for non-performance of the act agreed to be done.

This Act lays down another rule of presumption which is to this effect that courts shall presume that breach of an agreement to transfer immovable property cannot be adequately relieved by compensation in money and that the breach of a contract of transfer of moveable property can be thus relieved unless the contrary is shown.

¹ "To lay mind the whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in SPECIFIC the specific article for which he has contracted and he is not bound to take damages instead..... the court will grant the equitable remedy (specific performance) in all cases unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances, unless there has been a great hardship imposed on an innocent grantor, or lessor by reason of some mistake which he has made, although the other party has not contributed to it"—per Farwell J. in *HENTER v. PEACHER* (1910) 1 Ch. 41, 346

² S. 12-Sp. Rel. Act.

The act enumerates certain contracts which cannot be specifically enforced;¹ contracts for the non-performance of which damages would be an adequate relief, Contracts which contracts for personal service, contracts the cannot be specific terms of which are very vague, contracts cally enforced. which run into such minute and numerous details that court cannot enforce their performance and contracts which involve the performance of a continuous duty extending over a longer period than three years, are some of the contracts of this type.

Then again, there may be circumstance² in a contract, having regard to which a court in its discretion may refuse to grant specific performance, because to do so would be inequitable. Such for instance are cases where :—

The circumstances are such as to give the plaintiff an unfair advantage over the defendant, though there may not have been any fraud or misrepresentation on the part of the plaintiff; or

Where the performance of the contract would involve a hardship on the defendant which he could not foresee, whereas its non-performance would involve no such hardships on the plaintiff; a court in such a case will relieve the defendant against hardship though there may be no improper conduct on the part of the plaintiff.

Nor will a court enforce specific performance against a person, if the court is satisfied that his consent was obtained by misrepresentation, concealment, circumvention or unfair practices of the other party; nor where he had given his consent under a mistake of fact, misapprehension or surprise; a court likewise will not enforce specific performance of a contract against a person, if the consideration that he receives is grossly inadequate.³ ✓

Specific performance is not altogether a matter of right of the parties; a court in a suit for specific performance has

1 S. 21 Sp. R. Act.

3 S. 28 Sp. R. Act.

2 S. 22 Sp. R. Act.

Discretion

free discretion,¹ and is not bound to grant such relief merely because it is lawful to do so; the discretion of the court, however, is not arbitrary but sound and reasonable and guided by judicial principles; a court cannot act upon caprice or sentiment but its discretion must be exercised upon recognised principles.

The other important remedy under the Act is that of Injunction.² An injunction is an order made by the court for-

Injunctions.

bidding a person from doing a certain act; a disobedience of this order will be treated as a contempt of court which is punishable by attachment or committal. An injunction is granted to "restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions and to secure permanent enjoyment of the rights of property."³

Injunctions may be Temporary or Interlocutory, or Perpetual. An interlocutory injunction is granted while a suit is actually pending and its object is to pre-serve the property in dispute in *status quo*, until the hearing of the suit or until further order. A perpetual injunction can be granted by a decree of the court made after hearing the parties upon the merits of the suit. The defendant is thereby perpetually enjoined from the assertion of a right or the commission of an act which would be contrary to the rights of the plaintiff.

An injunction from its very nature is prohibitory, but there is another class of injunctions which are both restitutory and prohibitory.⁴ A who is B's neighbour builds a new house the result of which is to obstruct light to the access and use of which B is entitled (by prescription). B can obtain an injunction not only to restrain A from going on with the building, but also to pull down so much of the building as it obstructs B's light. This is what is known as a mandatory injunction and is thus defined—"When to prevent the breach of an obligation, it is necessary to compel the performance

"Discretion" when applied to a Court of Law means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful but legal and regular."—Lord Mansfield.

¹ 1 S. 22 Sp. R. Act.

² S. 55 Sp. R. Act.

³ Story

⁴ S. 52-54 Sp. R. Act.

of certain act which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts." A mandatory injunction is mainly given for protecting easements and in cases of certain torts. The object in every case is to compel the defendant to restore things to their former condition.

The granting of an injunction was and is a matter of discretion with the court, but it should be noted that courts are of late liberal in granting it than they used to be in former times; no hard and fast rules are laid down for defining the wide powers of a court to administer preventive relief though certain preliminary rules are laid down in Ss. 54 and 56. The rule however, may be generally stated that an injunction will be granted when the defendant invades or threatens to invade the plaintiff's rights to or enjoyment of property and compensation in money would not afford an adequate remedy. Courts, again, will not grant an injunction when it would work an immediate mischief or serious injury, or when it is of opinion that it would be oppressive or inequitable to do so or when the conduct of the applicant has been such as to disentitle him to the assistance of the court.

✓ Coming to the other remedies, remedies of considerably narrower range than the two which have been hitherto discussed, the first one dealt with by the Acts

Summary Remedy under S. 9. is the relief which is given by taking possession of certain property and delivering it

to a claimant. A person who is entitled to the possession of particular immoveable property which is in the possession of another must in the usual course of thing bring a regular suit for the recovery of the same, and the Civil Procedure Code prescribes the manner in which such a suit can be instituted. But cases may arise and as a matter of fact do arise when a person who is in possession of a house or a piece of land is dispossessed by another, otherwise than in due course of law, that is by a person

acting on his own authority and without the intervention of the normal process of law. In such a case, it is not necessary for the person so dispossessed to bring a regular suit for the recovery of his property ; he may do so if he so chooses but law gives him an additional remedy—a special summary remedy—whereby any person who without his consent is dispossessed of immoveable property, otherwise than in due course of law, may by a suit recover possession of the same, notwithstanding any other title that may be set up against him in such suit. The suit must be brought within six months from the date of dispossession. All that the person dispossessed, has to do in such a suit is to establish that he was in possession of the immovable property within six months of the suit and that the defendant dispossessed him of the same otherwise than in due course of law, *e. g.*, by force, fraud etc. A court, in a suit of this description will not inquire into any title that may be set up by the defendant, but, if it is satisfied that the plaintiff was in possession and dispossessed as alleged, will order that the plaintiff may be put in possession, no matter what title he had. The object of this relief is to discourage people from taking the law in their own hands, however good their title may be. A person who thinks that he is entitled to a property in possession of another cannot with a high hand eject such person but must bring a proper suit and establish his own title.

A suit can also be brought under certain circumstances for the recovery of articles of movable property, by a person who is entitled to the immediate possession of the same as against a person who is in possession of the article and of which he is not the owner ; such for instance would be cases where the person in possession holds the articles or goods as agent or trustee of the plaintiff ; the defendant in such a case will be compelled specifically to deliver the articles or goods to the plaintiff ; so also, when compensation in money would not afford the claimant adequate relief for the loss of the thing

claimed or when it would be extremely difficult to ascertain the actual damage caused by the loss of the specific article. Ordinarily, in the case of a movable, it is easy to ascertain its value and that sum would be deemed an adequate compensation for its loss; but it also happens that a person may be entitled to the possession of articles of curiosity or antiquity or of peculiar value to him, *e. g.*, heirlooms, family idols etc. which cannot be estimated in the ordinary medium of exchange; the only recourse for a court of equity in such cases is to compel their actual delivery.

Another remedy under the Act is that of Rectification of Instruments.¹ When through fraud or mutual mistake of the

Rectification of Instruments. parties, a contract or other instrument in writing does not truly express their intention, either party may institute a suit to have the

instrument rectified; and if the court finds it clearly proved that there has been fraud or mistake in framing the instrument, it will ascertain the real intention of the parties in executing the same, and may in its discretion rectify the instrument so as to express that intention, provided of course that this can be done without prejudice to rights acquired by third persons in good faith and for value. An oral agreement for the sale of land is reduced in writing, but owing to a common mistake, the written agreement fails to express the real bargain between the parties and the mistake is embodied in the deed of conveyance. A court will rectify the mistake on an application by either of the parties. The court in administering equitable principles permits mistake to be proved when it is common, that is, when the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established then the Court can give the relief of rectification, but be it noted that what is rectified is not the agreement, but the mistaken expression of it. Ordinarily, this mistaken expression would be in the form of a document, and the existence of a real agreement prior to the document is necessarily implied. The rectification consists in bringing the document into conformity with this prior

¹ Ss. 31—34 Sp. R. Act,

agreement, and without such agreement, there can be no rectification.¹

A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and if the court thinks fit, specifically enforced.

Then there is the remedy by way of Rescission of Contracts.² The general rule of law is that a contract cannot ordinarily be rescinded by one party only

Rescission of Contracts without the consent of the other; there are certain cases however when a person who is

a party to a contract may bring a suit to have the contract rescinded. A court will adjudge rescission when a contract is voidable or terminable by the plaintiff; or where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff, that is the parties must not have been *in pari delicto*; or where a decree for specific performance of a contract of sale, or of a contract to take a lease, had been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the court has ordered him to pay. The remedy of rescission like all other equitable remedies under this Act is a matter of discretion with the court. On adjudging the rescission of a contract the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require. It is a well-known maxim of equity that "he who seeks equity must do equity."

Cancellation of Instruments³ is another remedy dealt with by the Act. Any person against whom a written instrument is void or voidable and who has reasonable apprehension that such instrument if

Cancellation of Instruments. left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the court may in its discretion so adjudge it and order it to be delivered up and cancelled. As Mr. Justice Story points out, equity is not merely remedial, but it is also

¹ Per Sir Lawrence Jenkins C J in *DAGU v. BHANA* 20 Bom 420 2 Sa- 35-38 Sp. R Act 3 Ss. 39-41 Sp. R Act

preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it, since he can only retain it for some sinister purpose. A representing that the machinery in his factory is worth Rs. 50,000 insures the same with B; after the policy is issued B finds out that there was no machinery worth the name in A's factory and that what little there was, was hardly worth Rs. 2,000 ; B may obtain cancellation of the policy.

The court in such cases interferes to prevent multiplicity of suits, or irreparable mischief before it actually takes place on the principle of *quia timet* ; a party against whom a spurious instrument in the possession of another is outstanding may well be afraid that at some distant future date it may be set up against him ; his own witnesses may or may not then be in existence ; it is indeed necessary that though there has been no violation of his rights the specific relief by way of cancellation of the spurious instrument should be granted to him. On adjudging the cancellation of an instrument a court may, as it does in the case of Rescission of a contract require the party to whom it grants the relief to make any compensation to the other party if the equities of the case so demand.

Next we come to the relief of Declaratory Decrees,¹ a remedy of considerable extent and importance. Any person entitled to any legal character, or any right Declaratory Decrees as to property, may institute a suit against any person denying or interested to deny, his title to such character or right and the court may in its discretion make a declaration that he is so entitled. Such for instance would be a suit by reversioners when a Hindu widow alienates or attempts to alienate property in her possession and in which property she has only a widow's estate. Disputes may arise as to whether A is B's wife or not or whether the adoption of C by D a Hindu widow was valid or not or whether A is entitled to a right of way over

B's land or not ; in all these cases any person whose rights to any property or any legal character are affected may institute a suit for a declaration of the right or status.

"These actions" says *Collett* "are designed for the purpose of making that clear which is at present doubtful, and which it is necessary to make clear. In such actions some right is craved to be declared in favour of the pursuer, but nothing is sought to be paid or performed by the defender. Decrees upon such actions confer no new right ; they only declare what was the pursuer's right before."

It is not necessary in suits of this description that the plaintiff must be able to ask for any relief besides a mere declaration of his right ; but if the plaintiff is able to ask for further relief, a relief in addition to the declaration sought for, he must ask for it in the same suit.

Another relief—a relief which is protective or preventive—is that of appointment of Receivers.¹ When it appears to the court that it is necessary for the Receivers, realisation, preservation, or better custody or management of the property which is the subject matter of the suit, the court will in its discretion appoint a receiver. The object of the appointment of a receiver is to provide for the safety of property in dispute pending a litigation, and to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted or for persons having immediate but partial interests. A beneficiary for instance can have a receiver appointed pending a suit, if he can show that the trustee is guilty of misconduct or waste or other improper disposition of the trust property or that trust property is in danger.

A receiver is defined to be "an indifferent person between the parties, appointed by the court to receive rents, income and profits of lands or other things in question, pending the suit, where it does not seem reasonable to the court that either party should do it or when a party is incompetent to do so as in the case of an infant."

Finally, we come to the relief which is given by ordering public servants and others to do certain specific acts.¹

Enforcement of public duties This is a relief which can be granted only by the High Court of Calcutta, Madras and Bombay, any of which may, in certain circumstances make an order requiring any specific act to be done or forbore, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, or by any corporation or inferior court of justice.

In order however to get this relief it is necessary for the applicant to show, in the first place, that the public officer or corporation is in law bound to do or to forbear from doing the specific act ; he must also show that he has no other adequate remedy at law ; that the remedy will be complete and that the doing or forbearing from doing the particular act by the public officer or corporation is consonant to right and justice.

The principle underlying this relief is the same principle on which the statutory writ of *mandamus* is issued in England.

THE SPECIFIC RELIEF ACT

(ACT 1 OF 1877)

*An Act to define and amend the law relating to
certain kinds of Specific Relief.*

Preamble—Whereas it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits, it is hereby enacted as follows:—

NOTES.

1. **Preamble**—The beginning of a statute is called preamble. It is a key to the intent of the maker of the Act and the mischiefs which they would remedy by the same.¹

2. **Kinds of Specific Relief**—This Act provides for different kinds of specific relief. These are the remedies peculiar to equity courts ; most of these are remedial or protective, *e. g.*, specific performance, variation, rectification, cancellation, etc., and one of them is preventive, *viz.*, relief by way of injunction.

3. **Specific**—At law, the ordinary remedy is compensation in *money* so far as civil wrongs are concerned ; that is the general relief ; as opposed to that, the different reliefs provided for by this Act are called *specific*, inasmuch as they lie outside the ordinary order of legal redress.

Act not exhaustive—The preamble indicates that the Act does not purport to be an exhaustive enactment. It deals with certain kinds of specific relief obtainable in Civil suits. Other forms of specific relief are described in statutes other than the Specific Relief Act *e. g.*, in a case of a con-

¹ Tomlin's Law Dict-

tract for mortgage, the mortgagee may sue for foreclosure or sale, and the mortgagor may sue for redemption of the mortgaged property under the provisions of the Transfer of Property Act.

Specific relief may also be sometimes given in criminal cases, *e. g.*, Chapters 10, 12, 43 of the Criminal Procedure Code.

PART I.

Preliminary.

1. *Short title.*—This Act may be called the Specific Relief Act, 1877.¹

Local extent.—It extends to the whole of British India except the Scheduled Districts as defined in Act No 14 of 1874.

Commencement.—And it shall come into force, on the first day of May, 1877.

NOTES

1. “**British India**”—Shall mean all territories and places within His Majesty’s dominions which are for the time being governed by His Majesty through the Governor-General of India or through any Governor or other Officer subordinate to the Governor-General of India, *Vide* S. 3 (cl. 7) of the General Clauses Act X of 1897.

2. **Scheduled Districts**—This Act is extended to the following Scheduled Districts by the different Government notifications as under:—

Footnote-1 For the statement of objects and reasons; See *Gazette of India* 1875 Pt. V- P: 258; for the Report of Select Committee: See *ibid* 1876 Pt. V; P: 1445; for discussion in council; See *ibid*; 1875; supplement P. 981 and 1025 *ibid* 1876 supplement; P: 1284 and *ibid*: 1877 supplement P: 177;

NO.	DISTRICT.	WHEN.
I	Scheduled Districts of Punjab...	Gazette of India
II	Districts of Kamrup, Nangoog, Dairang, Sibsagar, Lakhimpur, Goalpura, Sylhet. and Kachar...	22nd Sept., 1877
III	Districts of Hazaribag, Loharduga, Manbhoom, Dholbhoom...	10th Nov., 1877.
IV	Morar Cantonment	16th Feb., 1878.
V	Jhansi Division	7th Sep., 1878,
VI	Scheduled Districts of Central Provinces	26th Sep., 1879.
VII	Sindh	13th Dec., 1879.
VIII	Coorg	4th Dec., 1880.
IX	Western Jalpaiguri	3rd June, 1882.
X	Kumaon and Garhwal and the Tarai Parganas (Except S. 9) See Gazette of India	10th Dec., 1882.
XI	That portion of the Jalpaiguri District known as Western Dvairs. See Gazette of India	1895, Pt. I p. 573.
XII	Ajmer and Merwara. See Gazette of India.	1896, Pt. I p. 573.
XIII	The Darjeeling District. See Gazette of India.	1897, Pt. II, p. 1415
		1919 Pt. I, p. 152

[The whole of the Act is extended to the above Districts whereas Ss. 2 and 9 only are extended to the Taluks of Bhairachalam and Rakapalli and the Rempa country. 4th Oct., 1879.]

2. [This section is repealed by Act 12 of 1891, Sch. I.]

3. *Interpretation clause*—In this Act, unless there be something repugnant in the subject or context,—

“ *Obligation* ” includes every duty enforceable by law.

“ *Trust* ” includes every species of express, implied or constructive, fiduciary ownership.

“ *Trustee* ” includes every person holding, ex-

pressly, by implication or constructively a fiduciary character.

ILLUSTRATIONS.

(a) Z bequeaths land to A, "not doubting that he will pay thereout an annuity of Rs. 1,000 to B for his life." A accepts the bequest. A is a trustee, within the meaning of this Act, for B to the extent of the annuity.

(b) A is the legal, medical or spiritual adviser of B. By availing himself of his situation as such adviser, A gains some pecuniary advantage which might otherwise have accrued to B. A is a trustee, for B, within the meaning of this Act, of such advantage.

(c) A, being B's Banker, discloses for his own purpose, the state of B's account. A is a trustee, within the meaning of this Act, for B, of the benefit gained by him by means of such disclosure.

(d) A, the mortgagee of certain leaseholds, renews the lease in his own name. A is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

(e) A, one of several partners, is employed to purchase goods for the firm. A unknown to his co-partners, supplies them, at the market price, with goods previously bought by himself when the price was lower and thus makes a considerable profit. A is a trustee for his copartners within the meaning of this Act, of the profit so made.

(f) A, the manager of B's indigo factory, becomes agent for C, a vendor of indigo seed, and receives, without B's assent commission on the seed purchased from C for the factory. A is a trustee, within the meaning of this Act, for B, of the commission so received.

(g) A buys certain land with notice that B had already contracted to buy it. A is a trustee, within the meaning of this Act, for B, of the land so bought.

(h) A buys land from B, having notice that C is in occupation of the land. A omits to make any inquiry as to

the nature of C's interest therein. A is a trustee, within the meaning of this Act, for C. to the extent of that interest.

"Settlement" means any instrument (other than a will or codicil as defined by the Indian Succession Act) whereby the destination or devolution of successive interests in movable or immovable property is disposed of, or is agreed to be disposed of.

Words defined in Contract Act: and all words occurring in this Act which are defined in the Indian Contract Act, 1872, shall be deemed to have the meanings respectively assigned to them by that Act.

NOTES

Obligation—This term is used in this Act in its judicial sense; it is sufficient if the duty is enforceable by law whether it springs out of contract or tort. In English Law, on the other hand, the word is used in a very limited sense as connoting duties springing out of contract. In Roman Law "Obligation" is confined to duties between respective persons, and it is in the Roman sense that the word obligation is mostly used now. The word obligation occurs in this Act in a few places only e. g., S. (5) (b) with reference to specific performance and S.(5)(c), 54 and 55 with reference to injunctions.

Trust—This term is differently defined in the Indian Trusts Act II of 1812 which was passed later than this Act and in English Books on Equity. In S. 3 of the Trusts Act it is defined as ("an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him for the benefit of another or of another and the owner.") In England it is defined as being "a beneficial interest in or beneficial ownership, of real or personal property, unattended with the real ownership thereof." Trust in the sense in which that term is used by English Lawyers, i. e., confidenc-

es to the existence of which a legal and equitable estate are necessary, were unknown to Hindu and Mahomedan Law. Illustrations given are meant to explain the extent of definitions; not to state cases following within any section of the Act.

Different kinds of trust—Trust may be *private or public*; private trust may be created by act of party, or may arise by operation of law. Those arising from act of party may again be sub-divided into *express and implied trusts*. We have thus three kinds of private trusts, express, implied and constructive; if a trust is implied in favour of the person who creates it (the settlor) it is said to be a resulting trust.

Express Trust—A trust is said to be express when it is fully and clearly expressed by the author thereof—orally—or in writing; the command is explicit enough leaving no doubt as to the intention of the settlor to create a trust and the only question is as to the construction of the terms used in the instrument of trust; such a trust may be, executed or executory. It is said to be executed when the grantor has expressed for himself the limitations of the interests he grants; in other words, he is his own conveyancer; the words used are to receive the same interpretation as at Common Law. It is said to be executory when the grantor merely leaves instructions to the trustee who has thereafter by a further instrument to limit and convey the beneficial interests intended to be granted; such trusts generally arise out of wills or marriage settlements.

Implied Trust is one which is founded on unexpressed but presumed intention of the settlor; intention is present though not expressed. It arises by act of party; Ills, (a) is an example of this kind of trusts: When a trust is implied in favour of the party creating it, it is said to be a resulting trust) *e. g.*, When a person advances purchase money for property bought in the name of another or when there is an unexhausted residue, *i. e.*, the settlor conveys property entrusted which does not exhaust the whole property, or

when it is transferred for illegal purpose which is not carried out, or when there is a tenancy in common.

Constructive Trust—A constructive trust is that which arises from the construction of a trust, independently of any intention of the parties either express or implied. In this class, there is no intention expressed by the settlor, but it is raised by a Court of Equity, to defeat the different kinds of frauds, actual or constructive—Illustrations (b) to (h) are examples of this class.¹ A Court of Equity raises such a trust irrespective of the intention of the parties, *e. g.*, Vendor being unpaid (by giving him a lien) or where there is a fiduciary relationship between the parties, or when improvements are made by a limited owner. “*Precatory*” trusts, such as, where the terms are not explicit but words of recommendation, hope, desire, confidence or request, are used, come within this class of cases.

There is however a difference between precatory trusts and constructive trusts. In precatory trust, the intention is not declared directly but declared indirectly. It is therefore a sort of implied trust. In constructive trust, the intention is not declared at all, directly or indirectly, but it follows from the acts or conduct of the parties or arises from operation of law.

Requisites of a valid Trust.

- (1) There must be a lawful purpose,
- (2) The settlor must indicate with reasonable certainty the subject matter, the objects thereof, and his intention.
- (3) There must be a writing in certain cases : In England by statute of frauds, all express trusts have to be in writing

Settlement—The word ‘ settlement ’ means an instrument by which properties are disposed of, in favour of two or more persons successively and not concurrently, and the disposition is to take effect during the life time of the settlor. These instruments are not so much used in India as in England. The definition of the term in this country excludee

¹ Soar v. Ashwell [1893] 2 Q. B. 890; 896

the disposal of property by way of settlements under a will. It is an instrument that operates *inter vivos*. It is said to be "executed" when the property is disposed of by it and "executory" when it is only agreed to be disposed of; in other words when it needs a further conveyance to complete its disposal. This term further contemplates devolution of *successive interests*, i. e., not a disposal of an interest or benefit in favour of one person or a body of persons concurrently, but in favour of two or more persons who take interests or benefits successively one after the other. A Settlement may be voluntary or for valuable consideration: in the former a Court of Equity will not enforce it unless the same arises out of a will, or is in favour or parity of the property is transferred to a trustee, *Ellison v. Ellison*¹. The definition of 'settlement' is given in the general interpretation clause because the relief awarded varies in different cases.

Words defined in the Indian Contract Act—

The following terms defined in the Contract Act occur in this Act in the sections mentioned.

Agreement—Ss. 4 (a), 23 (e), (f), 32; **Consideration** Ss. 24 (d), 25 (c), 28 (a); **Fraud** Ss. 22(1), 26, (a), (b), 28, 31.

Misrepresentation—Ss. 22(1), 26 (c), 28 (c), 39 **Principal** S. 23 (b); **Sale** Ss. 18, 25, 35 (c) (1); **Voidable** S. 35, (a) 39.

The definitions of those terms, are noticed where they occur.

Illustration—(a).—This is an instance of property trust. The modern trend of English decisions is to restrict the doctrine of precatory trust.² See the Indian Trusts Act, S. 6, ill. (a).

Illustration (b).—Cf. Indian Trusts Act, 1882, S. 88—This is an instance of constructive trust.

Illustration (d).—S. 61 of Transfer of Property Act also deals with the case of a mortgagee renewing a lease—See S. 90, Indian Trusts Act.

¹ 1 W. & T. 273

² *Musson v. Brink v. Raynor* (1882) 7 A C 331

Illustrations (g) and (h).—Ill. (g) is a case of a person buying with actual notice, while ill. (h) is a case of a person buying with constructive notice. It is clear from provisions of S. 91, I. T. Act ; S. 40, T. P. Act and ill. (g) of S. 3, Specific Relief Act that a person buying with notice actual or constructive stands in a fiduciary position.

There is a conflict of opinion between the Bombay High Court¹ Allahbad High Court² and Calcutta High Court³ on the one hand and the Madras High Court⁴ on the other as to whether the vendor is entitled to a decree for possession in a suit to eject the vendee who is in possession of property under an agreement to sell immovable property. The Madras High Court is of opinion that the vendor is entitled to a decree for possession on the ground that the provisions of S. 54, Transfer of Property Act, are imperative and that a mere contract for sale does not create any interest in the property agreed to be sold. The Bombay High Court held that the vendor in such a case is not entitled to recover possession as the vendor stands in a fiduciary position to the vendee having regard to the provisions of S. 91, I. T. Act, S. 40, T. P. Act ill. (a). It is quite competent to the purchaser to plead that the vendor has agreed to sell, the agreement being at the date of the suit capable of specific enforcement and that he was willing to perform his part of the contract. It is submitted that the view adopted by the Madras High Court is not correct.

✓ 4. Savings.—Except where it is herein otherwise expressly enacted nothing in this Act shall be deemed...

1 Gangaram V. Laxman (191) 0 Bom 438-37 1; C; 560

Laxmanrao v; Bhagwansingh (19 1) 45 Bom; 434

Venkatesh Dimodar v; Mallappa Bhimappa (1922) 46 Bom; 722

2 Begum v; Mahomed Yakub 16 All 344

Solanaruzzamin Begum v, Masha Allah Khan 40 All 187

3 Md. Musa v. Ashorekunvar 42 Cal 801

4 Kurri Veerareddi v. Kurri Balireddi 20 Mad 335 (F. B.)

(a) to give any right to relief in respect of any agreement which is not a contract ;

(b) to deprive any person of any right to relief other than specific performance, which he may have under any contract ; or

(c) to affect the operation of the Indian Registration Act on documents.

NOTES.

No Relief in respect of void agreements—The term " contract " imports that there should be (a) an agreement, *i. e.*, offer and acceptance ; or in other words, a promise or a set of promises which form consideration for each other, and (b) that it should be a lawful one between competent parties, and (c) not expressly declared to be void. An agreement may become a contract even though it be voidable under certain circumstances : but it would not be a contract if it is void, *i. e.*, it is not enforceable at law. S. 4 (a) excludes from the operation of this Act (1) void agreements and (2) imperfect obligations, *i. e.* which are not duties imposed by positive law. *e. g.*, moral, religious or social duties. Voidable agreements are not covered by this clause.

Right to alternative Relief is not lost—The Specific Relief Act does not restrict a person's remedies ; it provides for further equitable remedies : a person is not even bound to sue for a particular relief : it is for the party himself to choose ; he may ask for specific performance or mere damages. It must be noted however that though he is entitled to the various reliefs and is not restricted to any, he cannot be allowed to bring two suits on the same contract : S. 29 of this act says in express terms that if a suit brought only for specific performance is dismissed, it will bar a fresh suit for damages. A person has therefore to ask for both in the alternative in the same suit.

The operation of the Registration Act is not affected—The provisions of the I. R. Act with which we are concerned are Ss. 17 and 49. S. 17 enumerates the documents of which registration is compulsory, and the punishment for breach of this rule is provided for in S. 49 which says that if such a document is not registered it cannot affect any immoveable property comprised therein, or be received as evidence of any transaction affecting such property. But then such a document though inadmissible in evidence as creating an interest in land is admissible for the purpose of obtaining specific performance of the agreement.¹ Where an agreement to lease falls within the definition of lease under S. 2 Indian Registration Act, and is required to be compulsorily registered, it cannot be received in evidence in a suit for specific performance.¹ But where an agreement does not operate as a present demise, it does not fall within the definition of lease under S. 2 of the Registration Act, it is admissible in evidence of the agreement which is embodied.²

Case—*Nagapa v. Deza*³. A executed sale deed of lands to B and B alleging that A had improperly refused to register the deed, sued for a decree compelling A to get the document registered and deliver possession to B; the Madras High Court gave B a decree on the ground stated in *Adakalam v. Theethan*⁴ viz.—that it is admissible in evidence for the purpose of obtaining specific performance of the agreement to sell. See also *The Bengal Banking Corporation v. S. A. Meckertich*⁵.

Whatever may have been state of law previously, the matter has been set at rest by the enactment of proviso to S. 49, I. R. Act by Act XXI of 1929, by which an unregistered document affecting immovable property required to be registered may be received as evidence of a contract in a suit for specific performance or evidence of part perform-

1 *Narayan Chetty v. Muthiah Servai* 56 Mad; 63

2 *Hemanta Kumari v. Midnapur Zamindars Co; Ltd*: 47 Cal 485 (P. C.); 22 Bom. L. R. 438

3 14 Mad; 55

4 12 Mad; 505

5 16 Cal; 315

ance of a contract (S. 53 A of T. P. Act) or as evidence of any collateral transaction not required to be effected by registered document. Again, under S. 27 A of the Sp. Re. Act which was added by the same Act viz Act XXI of 1929, where there is a contract to lease immoveable property after 1st April 1930 made in writing signed by the parties, either party may, though required to be registered, sue the other for specific performance of it there is delivery of possession in part performance of the contract. It may be noted that the rights of a transferee for consideration who has no notice of the contract or of part performance are not affected.

5. *Specific relief how given*—Specific relief is given:—

(a) by taking possession of certain property and delivering it to a claimant ;

(b) by ordering a party to do the very act which he is under an obligation to do ;

(c) by preventing a party from doing that which he is under an obligation not to do ;

(d) by determining and declaring the rights of parties otherwise than by an award of compensation ;

(e) by appointing a receiver.

NOTES.

Specific relief how given—The 5 clauses of this section cover all the possible equitable reliefs provided for by this act and each clause refers to a different grant.

✓ Cl. (a) refers to the relief given in Ch. 1, i. e., specific delivery of immoveables and movables (Ss. 8-11).

✓ Cl. (b) refers to that given in Ch. 2 i. e., specific performance of a contract or performance with a variation (Ss. 12-30) or its rectification, rescission or cancellation

(Ss. 31-41) or enforcement of public duties (Ss. 45-51).

✓ Cl. (c) refers to the preventive relief given by injunction (Ss. 52-57),

Cl. (d) refers to the relief given by a declaratory decree (S. 42) when there is no consequential relief.

Cl. (e) refers to appointment of receiver (S. 44)

✓ 6. *Preventive Relief*.--Specific relief granted under Cl. (c) of S. 5 is called Preventive relief

7. *Relief not granted to enforce a Penal Law*.--Specific relief cannot be granted for the mere purpose of enforcing a penal law.

NOTES.

Enforcing of Penal law must not be the sole object—The real object of giving specific relief to a suitor is to protect some civil rights of his or to prevent any civil wrong to him; a court of equity would grant specific relief if this be the object of the suitor seeking it: but the court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal and do not affect any rights of property. If the enforcing of a penal law is merely an incidental matter, the courts will not refuse specific relief. The force of the word “mere” in the section may be noted:

*Bank of Bengal v. Dinanath*¹—A prosecutor whose charge against B was dismissed by a Presidency Magistrate, being affected by the order of discharge, applied for copies of the order and the depositions and it was held that he was entitled to these on the ground that: “An application to the Magistrate for such copies was not an application for the mere purpose of enforcing a Penal law, for copies may be required for many purposes.”

Specific Relief being a civil remedy, the Plaintiff must show some individual right in every case where he seeks Specific Performance of what is due to him or redressing of wrong committed or threatened against him by another.

PART II.
Of Specific Relief.
CHAPTER I.

Of recovering possession of property.

(a) Possession of immoveable property.

8. *Recovery of specific immoveable property.*--

A person entitled to the possession of specific immoveable property may recover it in the manner prescribed by the Code of Civil Procedure.

NOTES.

1. **Possession**—This term is not capable of simple definition; in common speech a man is said to possess or be in possession of anything of which he has the apparent control, or from the use of which he has the apparent power of excluding others: it does not necessarily involve physical contact; it is enough if there is either physical contact or physical contact resumable at pleasure, *i. e.*, power to exclude others from the use of the thing. This is what is meant by physical possession, or *de facto* or natural possession; but to amount to legal possession the presence of a certain further element is necessary, *viz.*, the *animus*, *i. e.*, mental relation between the person and the thing; or in other words the intention of exercising the power of excluding others and dealing with it at pleasure on behalf of the person having it. It must be noted however that legal possession does not necessarily mean possession rightful in its origin. As *Hollana* puts it "it simply imports that the corporeal fact of capacity to exclude others from an object is coupled with the mental fact of intention either to keep it in his custody, *e. g.*, a servant on behalf of a master (representative), or to keep it as claiming through one, *e. g.*, borrower, lessee (derivative) or as against the whole world". To put briefly as the Romans say, there should be (i) *corpus*, (ii) *animus*. Equity courts give this relief for, as said in Roman Civil Law Digest, the protection of possession is the foundation of the great bundle of rights known as ownership of property.

Immoveable property: See note to next section.

Manner of recovering possession prescribed by the C. P. C. (This means a suit of ejectment on basis of title)¹—The general rule for recovery of possession of property by him who has a right to its possession is to bring a suit in ordinary course; the decree then follows and it is executed in the manner provided in O. 21, r. 35, Civil Procedure Code. Possession is to be delivered over to the party to whom it has been adjudged or to such person as he appoints to receive delivery on his behalf and if need be, by removing any person bound by the decree who refuses to vacate the property. When the property is in the occupancy of a tenant or a person entitled to occupy it and not bound by the decree to relinquish the occupancy, delivery is under O. 21, r. 36 to be made by affixing a copy of the warrant in a conspicuous place on the property and proclaiming to the occupant by beat of drum, or otherwise, the substance of the decree.

3. Suit by person dispossessed of immoveable property—If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit [instituted within six months from the date of dispossession], recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

No suit under this section shall be brought against The Secretary of State, The Central Government, The Crown Representative or any Provincial Government.

¹ Lachman v. Shambu Narayan (1911) 33 All 174, 180; 7 I. C. 485.
(F. B.) Halim Yasin v. Mustakim Alaf A I. R. 1942 Pesh. 42

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

NOTES.

This section affirms an important principle of substantive law. Disputed rights are to be decided by due process of the law and not otherwise, and existing peaceable possession will be protected against disturbances without regard to the question of its origin.¹

Object of this Section.—This is discussed by good many Judges in many a reported case. We shall here deal with a brief summary of the *dicta* with the view of each High Court distinctly.

Bombay—It has been observed by *Sargent, D. J.*² "that the object of O. 9 of the Specific Relief Act is to discourage people from taking the law into their own hands however good their title may be." The Indian Legislature by this section has provided for the summary removal of any one who dispossesses another, whether peaceably or otherwise than by due course of law.³

Madras—In a very early case⁴ *Holloway and Innes, J. J.* observed that this section is intended, not to abridge any rights possessed by a plaintiff but to give him the right, if dispossessed otherwise than by due course of law, to have his possession restored without reference to the title on which he holds, and that which the dispossessor asserts; and that

¹ *Yellaz Sannaya v. Sannaya* 7 Jul 4; 1; R; 19'0 Pat; 133; 189 I; C: 878
Sona Mia v. Prokash Chandra A; I; R. 1940 Cal 454; 44 C; W; N; 895; 191 I; C; 803

² *Krishnarav v. Vasudev* 8 Bom 371 375; *Rudrappa v. Nursingrao* (1905) 29 Bom; 213

³ *Bindu v. Naba* 15 Bom 231

⁴ *Kunhi Karupen v. Changrachen Ambu* 2 M H C 313

the plain object is to discourage proceedings calculated to lead to serious breaches of the peace and to provide against the person who has taken the law into his own hands, deriving any benefit from the process.

Calcutta.—As ruled in an early case¹, this section puts a restraint on illegal dispossession by giving a special remedy to the party illegally dispossessed. In a later case² it has been said that object in introducing this section into the Specific Relief Act was to provide a special summary remedy for that class of cases where a person in physical possession of property is forcibly dispossessed; and that it was not intended to provide that a person who is in constructive possession (by receipt of rents from tenants), and not in actual physical possession, could sue for recovering possession in case of discontinuance of payment of rent by them.

Allahabad.—As said by *Edge, C. J.* in a Full Bench case.³ S. 9 was passed in order to prevent persons from ousting a man from possession except by the due process of law and it was intended that under that section a suit might be brought within six months and the person ousted be put into possession, no matter what title he had. It is a section the object of which is to drive persons who wanted to eject a person into the proper court and prevent them from going with a high hand and ejecting such person. The section has nothing to do with a suit for possession on title. It is merely a section which enables a man to come into court and be put back into possession if, although he had no title he was actually in possession, notwithstanding what title the other person may prove. It does not suggest that a person who had a possessory title should be compelled to bring his suit under that section or not at all. In the same case, *Straight, J.*, observed that S. 9 only reproduces the rule which says that a person having a right to which wrong has been inflicted is

¹ *Khajah v. Kishan Sundar* 8 W. R. 389

² *Tarani Mohan v. Gangaprasad* 14 Cal. 649

³ *Wali Ahmad v. Ajodhia* 13 All 558; *Badradas v. Mst Dhanni* A. I. R. 1934 All 541; 150; I. C. 738

entitled to come into court and assert that right: what S. 9 intended to do is to provide a summary and speedy remedy through the medium of the civil court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised. The remedy, independent of this section, of a suit founded on a claim of possessory title is not excluded.¹ The section is no more than a reproduction of the provision of the Roman Law by which the Proctor was entitled to restore possession to a person forcibly dispossessed of it.

Thus the object is (i) To give a speedy remedy. (ii) To give a special remedy. (iii) To prevent breaches of peace. (iv) To prevent the shifting of the burden of proof owing to dispossession. (*Nelson.*)

English Law—In India, even the rightful owner dispossessing a person otherwise than in due course of law, may be sued under S. 9; but in England if one is wrongfully in possession and the rightful owner peacefully enters, he is no trespasser; he acquires possession which he can maintain against any one; but then the Roman Law did not allow a person to take the law into his own hands and to assume the advantages of possession; and it is the equitable rule of Roman Law that is followed in S. 9, with this difference that the limitation here is six months instead of one year. This form of action known as *Possessory Action* was known in Roman Law as an *inter dictum de vi*.² The nature of these possessory actions has been put down by *Blackstone* to be to serve only to regain that possession, whereof the suitor or those through whom he claims have been unjustly deprived and that it decides nothing with respect to the right to property; it merely puts the demandant in the same state in which he was before the dispossession happened without prejudice to right of ownership. In England under early law a person dispossessed had 3 remedies under process of law,

¹ *Ram Dayal v Sarsawti*, (1926) 48 All 191-

Taylor v; Call Bom; L; R; 95;

besides the extrajudicial remedy of the right of entry; these were (a) writ of right (b) writ of entry (c) assize; assize was of 2 kinds (i) *assize mort de ancestor*, i. e., when a rightful heir was kept out of possession because of some stranger having entered (ii) *Assize Novel Disseisin* i. e., where the demandant himself had been turned out of possession. The remedy given in S. 9 of this Act is as said by *West J.* based upon the old English Assize of *Novel Disseisin*.

Res-judicata—It must be noted that a dismissal of a suit by a Mamlatdar under the Mamlatdar's Courts Act, Bom. Act II of 1906, is no bar to a subsequent possessory suit on the same cause of action in a civil court under S. 9 of the Specific Relief Act. In one case the defendant relied upon an old case, where the contrary was laid down; but the Full Bench (per *Jenkins, C. J.*) refused to agree with the reasoning in that case and held that there could be no *res-judicata* because the Mamlatadar's decision was not conclusive.²

Essentials of a suit under S. 9—All that has to be determined is whether, the plaintiff was dispossessed and whether the suit was brought within 6 months from when the dispossession occurred. It is not necessary that the plaintiff must have been in possession of the land for a particular time before the dispossession.⁴ All that is necessary is that it must be proved that the plaintiff was in possession, that he was dispossessed and that the suit has been brought within 6 months from the date of the dispossession. It is immaterial if the plaintiff was in possession, that such possession was without title. But the plaintiff will have to prove juridical possession and not mere isolated acts of trespass. He must prove that he exercised acts which amounted to acts of dominion, the nature of which must vary with the nature of the property.³

1. *Ramachandra v. Bhikhabhai* 3 Bom; 477.

2. *Ramachandra v. Narasing* 24 Bom; 251

Jhachannra Nag Dos v. Lonh Mohau Basak, 131 C. 541

3. *Raj Krishn Parni v. Mukatram Das* 7 Ind. Cas 700

Features of a summary suit—There is a difference between an ordinary suit on a possessory title under Art. 142 of the Limitation Act and a summary suit under this section. In the former, the court awards the claim only when it finds that the plaintiff had peaceable possession before dispossession and that the defendant had no title and is a wrongdoer, the plaintiff's previous possession being in law sufficient proof of his title. In the latter, the court can only go into the question of dispossession within 6 months before suit and cannot inquire into the defendant's title.¹ A suit barred under this section does not necessarily affect the plaintiff's title and he may still bring a proper suit for establishment of his title.² Dismissal of suit under this section does not of itself raise a presumption that defendant was in fact in possession.³

Who can sue—This section is very wide: Any person who has had juridical or legal possession can sue under this section. A landlord can sue though his tenant has been dispossessed: it is said both can sue provided there is no conflict of interest between them: the landlord can sue either on account of his agent's possession or on the ground of his interests in the land. The tenant can sue as being the agent of the landlord or as being actually in possession; this is because their possession is legally one. A suit by a landlord in which tenants in possession have not joined is not maintainable. It is an established rule of law that the possession of the landlord is the possession of the tenant and *vice versa*.⁴ This principle is recognized by West, J., in *Varjivandas v. Mahomed*, where it was said on a construction of the words "he or any person claiming through him may sue" that if the landlord sues in his possessory right he should sue in the tenant's

1 Ali Pacha v. Bhi 5 Bom. L. R. 264

2 Abdul Aziz v. S. K. Amir A. I. R. 1941 Nag. 130 193 I. C. 805

3 Iragala Kotayya v. Udonu Subbayya 120 I. C. 384; A. I. R. 1929 Mad 784

4 Ram Chandra v. Bisavayya A. I. R. 1934 Mad 553; 151 I. C. 878

5 Grishchundra v. Bhagwan

6 Bom. 20 Ratanlal Ghelabhai v. Rupsang 53 Bom. 775.

name, and if he sued for injury to the reversion he could sue in his own name. A person who was in joint possession may, on dispossession sue to be restored to joint possession. The words "any person" should be noted. There is nothing to prevent the landlord from filing a suit for recovering possession even where exclusive possession is given to the tenant. If the tenancy has terminated after the date of dispossession, the landlord may sue under this section, as the only person affected is the landlord, the tenant's interest having terminated with the lease.² The decided cases however lead to the inference that the section contemplates cases of *de facto* and legal possession. The person who sues must have what the law understands by "possession"; on these grounds it was held by *West, J.* that physical detention or occupation of land if suddenly taken and not acquiesced in is not such a possession on which a possessory suit could be founded; this is approved in a subsequent case.³ The possession as observed by *Mcville, J.*,⁴ must be one founded in right, *i. e.*, not mere recent possession. A trespasser cannot maintain a suit because as noted above he has never really been in possession; his act of dominion not having been exclusive of the real owner, he cannot be said to have been in juridical possession. A servant or a mere custodian cannot sue. It must be noted that though this section asks the court to decide possession and not title, the court can, however, as the decisions indicate, go incidentally into the question of title to determine whether the person alleging dispossession was in juridical possession as between the plaintiff and the defendant only; or as *Collet* puts it "when it is said that a plaintiff to succeed in a suit under S. 9 must have a juridical possession, it must be taken as meaning that he has such juridical possession as against the true owner."

This section cannot be applied to a case where the

1 *Balabhadras v Gaurdas* (1940) 225 A 525: A I R 1940 All 261

2 *Jaganath v Rama Rayer* 28 Mad. 238

3 *Amrudi v. Mahomed Jamali* 15 Bom. 635

4 *Dadabhai v Sub-Collector of Broach* 7 B H C 82

plaintiff has himself let the defendant hold possession, and the defendant has subsequently done acts indicating his intention to interfere with the plaintiff's ownership.

Illus.—A forcibly dispossesses B. of a piece of land and after some months' quiet enjoyment A is in his turn dispossessed by C. In this case A can sue C for he has a juridical possession as against him though as regards the true owner B, it is simply that of a trespasser; so far as C was concerned, A had a better title; A can succeed under S. 9. It must be noted that when it is said that "a mere trespasser cannot succeed in a suit under S. 9" it must be understood as meaning that a person who is a mere trespasser as regards the defendants in the suit cannot succeed. Where a person enters into possession lawfully under an alienation made by Hindu Widow and he is dispossessed by a third person, the person so dispossessed is entitled to restoration of possession on principle that ostensible title must be presumed to be good title unless displaced by some one having a better title. Alienation is not void and is good and valid unless reversionsers elect to treat it as not binding.

Character of dispossession.—Since the possession required by the section is physical, it follows that the dispossession should also be physical; so if A tells B a tenant of C not to pay rent to C but to pay to D, it is not dispossession of C, and C cannot sue under S. 9.

Immovable Property.—This term is not defined in this Act nor in the Contract Act; we therefore turn for the definition to the General Clauses Act. There it is defined to include lands, benefit to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth. This meaning is to be attached to the term unless there be something repugnant in the subject or context (S. 2 of this Act). As will be seen from the discussion of the

1 Baldeo Das v Mangui Ram. 1900 A W N 7

2 A I R 1936 Pat 602 Lilku Masto V Jamar Masto.

3 Tarini v Garga 1: Cal 349

different cases cited below, there is an irreconcilable conflict of decisions as to what may be included in the term "immoveable property" as used in S. 9 of this Act. A suit for right to collect rents is held to be within the section.¹ The real question on which there is a difference of opinion is whether this term...for the purpose of S. 9 includes mere rights of enjoyment of an incident of ownership, *e. g.*, right of ferry, right of fishery in water on the soil of another, in other words whether it includes both corporeal and incorporeal property, or to put it still clearly...whether there is anything in the subject or context of S. 9 repugnant to this meaning (including incorporeal rights.)

The *Bombay High Court* has held that a private right of usury comes under the denomination of immoveable property. Sargent, C. J., observed "Had it been the intention of the Legislature to exclude incorporeal rights we might expect that it would have been done by express terms or by confining the operation of the section to tangible immoveable property."²

The *Madras High Court* holds the same view.³ In this case the question was as regards a right of ferry.

The *Calcutta High Court* holds the contrary view; according to it the immoveable property intended to be dealt with by S. 9 is something of which actual physical possession can be given and taken; S. 9 does not contemplate the recovery of mere right.⁴ The section is inapplicable to easements.⁵ This section is inapplicable in case of lessee of a public ferry right. Lessee has merely right to collect tolls.⁷

Otherwise than in due course of law—The words

1 *Munsi Pillai v Sivaganga* 5 M L J 95

2 *Bhandal v Pondel* 12 Bom 221; *Mangaldas v Jewanram* 23 Bom 475

3 *Krishna v Akilanda* 13 Mad 54

4 *Fadu Jhala v Gour Mohun* 19 Cal 544 (F B); *Natabai v Kubir* 19 Cal 40; *Fuzlur Rahman v Krishna Prasad* 29 Cal 614

5 *Haro Dayal v Kristo* 17 W R 70

6 *Mang Idas v Jewanram* 23 Bom 473; *Jogendra Chandra v Bijendralal* AIR 1935 Cal 454; 39 C W N 391; 156 I C 324. *M. S. T. Rajeswar v—Moghibir Ram*—AIR 1931 All 505

7 AIR 1936 All 456 *Mohd. Ali Khan v District B. & A. D. Barilli*.

"due course of law" are not equivalent to "legally". This is the view taken by *Jenkins C. J.*, in *Rudrappa's case*¹ where it was held that to read the words "due course of law" in S. 9 as merely equivalent to the word "legally" is to deprive them of a force and significance which they carry on their very face. For a thing which is perfectly legal may still be by no means a thing done "in due course of law", to enable this phrase to be predicated of it. It is essential speaking generally that the thing should have been submitted to the consideration and pronouncement of the law, and "the due course of law" means the regular, normal process, and effect of the law operating on a matter which has been laid before it for adjudication. That is the primary and natural meaning of the phrase though it may be applied in a derived or secondary sense to other proceedings held under the direct authority of the law; in this sense, it may be said for instance that revenue or taxes are collected in due course of law; but this latter use of the expression has clearly no bearing upon the words in the particular context in which they occur in S. 9; there they must be read in their primary sense as referring to the process and operation of law, invoked by the ordinary method of a civil suit. A reference to the following cases² will indicate that the expression "due course of law" was there interpreted as being in contrast with the acting of one's own authority or acting without the intervention of the court. Dispossession in execution of a decree obtained against a third party is in due course of law.³ But a dispossession by legal process, which ought not to have been applied, is not one in due course of law⁴; so also if a tenant is dispossessed in execution of a decree against him by a landlord, it is not a dispossession otherwise than in due course of law⁵ and so also is a dispossession in consequence of final order under S. 145, Criminal Procedure

¹ *Rudrappa v Narasingarao* 23 Bom 213;

Kholah v Kisen Sundara 8 W R 389; *Saloto v Woopankhan* 9 W R

423. *Govardjan v Harahan* 9 W R 11; *Waliahwan v Ajudhia* 13 All 537.

³ *Haran Chandra Pal v. Madan Mohan* 15 C W N 958

⁴ *Roshanulla v. Hazir Mahmud* 18 I. C. 747.

⁵ *Kamini Sundari v. Sabeel Sheikh* 14 C. W. N 403.

Code. The right accrues to the plaintiff as soon as the possession is interfered with.

Illustrations : (i) If a tenant holding over after the expiry of the period of tenancy is dispossessed without his consent by the landlord, the tenant can sue under S. 9, for his eviction by the landlord *proprio motu* is otherwise than in due course or law.³

(ii) A mortgagee who is dispossessed by his mortgagor forcibly can recover possession under S. 9; it is no defence for the mortgagor in the summary proceeding to say that the mortgage was obtained by fraud of the mortgagee; he must bring a regular suit for the purpose.⁴

Notwithstanding any other title.--The court has not to look to any title other than the title by mere anterior possession; as we shall see below anterior possession is a strong evidence of title even in a regular suit; in a summary suit it is a complete title. In suits under section 9 of Specific Relief Act the court does not try questions of title and therefore the defendant cannot resist the plaintiff's suit on the ground of his being the rightful owner. The person who has been dispossessed is entitled to a decree for possession if he brings his suit within six months of the date of dispossession, "notwithstanding any other title that may be set up in such suit."⁵ Title is no defence in a suit under this section, but affords a conclusive defence in other suits.

S. 9 does not bar a regular suit to establish title--

This paragraph indirectly provides saving clause and gives the remedy to the person who either fails to bring a suit under S. 9, or who having brought it has lost it. To put briefly, if the person dispossessed comes within six months, he has a simple remedy to allege possession and dispossession within six months; but if he fails to come up within the statutory period, he is driven to the proof of his title, and the

1 Leo Moore v. Maunranjan 7 C. L. J. 547

2 Jomra v. Gangr 50 All. 321.

3 20 Bom. 213; 21 Bom 213

4 Sayaji v. Ranji 5 Bom 446

5 Gan-sh v. Dasso, (1927) 25 A. L. J. 859.

mere fact of his anterior possession would not alone be conclusive of his title; though of course it may be a piece of good evidence in his favour. Then arises the vexed question "what if the person who dispossesses him is a mere trespasser? Can the person dispossessed rely on his anterior possession and sue for possession? (After six months of dispossession) will he succeed if he is able to show his anterior possession or will he have to prove his own title? In other words can he eject his dispossessor after six months relying on his possession alone? The authorities on the point are conflicting, the Bombay, Madras and Allahabad High Courts on the one hand being of opinion that the existence of the summary remedy in S. 9, did not deprive a person of the right he would have had under the English Law in an ejectment suit, on proof of prior possession alone; these courts adopt the principle of the English Law that possession is a good title against all the world except the person who can show a better title: and a person in peaceable possession of land has, as against everyone but the true owner, an interest capable of being inherited devised or conveyed. In the privy council case of *Ismail Ariff v. Mohamed Ghouse*¹ their Lordships held adopting the English Law on the subject that "Lawful possession of land is sufficient evidence of right as owner, as against a person who has no title whatever, and who is a mere trespasser." This case has been followed in below mentioned cases.² The Calcutta High Court on the other hand distinguishing the Privy Council case has held that S. 9 barred a person from recovering possession on the mere ground of prior possession, unless the suit was brought within six months. This difference of opinion is mainly due to the different interpretation put on the decision of the Privy Council in

1 20 Cal 834 P. C. 20 I. A. 20

2 *Rajai Singh - Suraj Bah* AIR 1942 Oudh 179 *Mohan v. Mohan Singh* AIR 1925 Lah. 547, 158 I. 261.

Wise v. Ameerrunnissa.¹ We now turn to a sketch of the course of decisions of the various High Courts.

Bombay.—In *Dadabhai's* case² there is an *obiter dictum* of *Melville, J.*, to the effect that “as the law in India gives a person who is dispossessed of property, a remedy which he would not possess under the English Law, a plaintiff in a suit brought six months after his dispossession must recover by the strength of his own title and that if he does not choose to avail himself of the special remedy given by the legislature he has no claim to the advantages it would now secure to him.” Then *Westropp J.* concurring with *Melville, J.*, in the previous case, observed that “the law has fixed a period of limitation within which a party may recover possession without proof of title.” If he allows that period to lapse he must prove his title. In *Pemraj v. Narayan*⁴ however, the Full Bench held that possession is a good title against any one but the true owner and entitles the possessor to maintain ejectment against any person other than such owner who dispossesses him. Their Lordships considered the legal question of possession having regard to the English cases⁵. In a subsequent case *Sargeni, C. J.*, and *Kembal, J.*, held that a plaintiff suing more than six months after the date of dispossession was entitled to rely on the possession previous to his dispossession as against a person who has no title. In a recent case however it has been held that when a person who has lost possession sues to recover it, he can not rest on his prior possession alone. He must, besides proving possession within 12 years, must also prove title.⁶

Madras.—At one time⁷ the negative view was taken as in *Dadobhai's* case; but now it has been held⁸ that it is an

1 *Wise v. Ameerrunnissa* L; R; 7 I; A; 73.

2 *Dadabhai v. Sub-Collector of Broach* 7 B H C R 82.

3 *Laxmibai v. Nithal* 9 B H C 53

4 *Pemraj v. Narayan* 6 Bom; 215

5 *Jones v. Smith* 1 Hare 60; *Dood Highly v. Dyebalt My & Mall,*

346; *Ashr v. Whilock* L R I Q B I

6 *Krishnrao Ghotikar v. Vasudev* 8 Bom 371.

7 *Govindbhai v. Dahyabhai* 38 Bom L R 1/5 1631 C 638

8 *Kunhia v. Changara* 2 Mad H C 313.

9 *Mustapha v. Santhapillai* 23 Mad, 179.

undoubted rule of law that a person who has been ousted by another who has no better right, is with reference to the person so ousting entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title, and that S. 9 cannot be held to take away any remedy available with reference to the well recognized doctrine, that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. In this case, O Farrel J. said "The Dictum of P. C. in *Wise v. Amirunnisa* amounts to this that where a plaintiff in possession without a title seeks to recover possession of which he has been forcibly deprived by defendant having a good title, he can only do so under provision of Section 9 of specific Relief Act. The Contary to this is not however true."

Allahabad.—A full bench of Allahabad High Court has held that Section 9 does not debar a person who has been ousted by a trespasser from possession of immovable property, to which he has merely a possessory title from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of dispossession.² *Mahmud, J.*, in dissenting from the majority of the P. B. proceeded on the basis that *Ameerunnissa's* case,³ was an authority for saying that whenever a possessory title is made the basis of a claim such as this and is brought after the lapse of six months, such a title is not to be listened to because there has been too much delay for relying upon such a title. The Full Bench case was followed by the same High Court in a very recent case.⁴

Calcutta.—The decisions of the Calcutta High Court on the subject are conflicting. In earlier cases⁵ it was held that

1 *Ajodhia Parsad v. Ghasiram*
AIR 1937 Nag 326 *Pannalal Bagirath v. Beailal Vindrabaran*
AIR 1937 Nag 281.

2 *Wali Ahmad Khan v. Ajodhia Singh* 13 All 53

3 *Wise v. Ameerunnisa* 7 I. A. 73

4 *Ram Dayal v. Sarasvati* (1927)
49 All 191

5 *Mohabur Persad v. Mohabur Singh* 7 Cal 591 See also 7 W. R 174 and R W. S. 386

where the plaintiff was dispossessed by a person who was found to have no title, and to be a trespasser, it was sufficient for the plaintiff to prove that he was in quiet possession at the time when he was so dispossessed. S. 9 of the Specific Relief Act has not the effect of doing away with the English rule that possession is *prima facie* evidence of title. The contrary view was taken by the Calcutta High Court in later cases¹ where it was held that mere previous possession for any period short of the statutory period of twelve years would not entitle a plaintiff to a decree for recovery of possession, in a suit brought more than six months after dispossession, even if the defendant could not establish any title to the disputed land.

Summary.—The Privy Council² recognises the rule of English law that possession is good title against all but the true owner. It is not disputed that when a person is illegally dispossessed he can recover possession even against the true owner provided he brings his suit within six months from the date of dispossession. However, the well recognized principle of law that a person can succeed on the strength of his own title and not on the weakness of his opponent stands good as observed by their lordships of the Privy Council in the recent Patna Case.³ [There is a conflict of decisions on the question whether a person illegally dispossessed can recover possession against a trespasser if he brings his suit after six months from the date of dispossession on the strength merely of his previous possession without proving title. The Bombay.⁴

1 Debi Churn v. Issur Chunder 9 Cal. 9; Nien Chang Gaita v. Kanchi Ram Bagani 26 Cal. 570; Ertaza Hossein v. Bany Mistry 9 Cal. 120.

2 Sundar v. Parbati 16 I. A. 186 Ismail Arifg v. Mahomed Ghous 20 I. A. 99.

3 Katar Shingh v. Dayaldas 42 Bombay L. R. 1.

4 Pemraj v. Narayan 6 Bom. 215 (F. B); Kishna v. Vasudev 8 Bom. 371; Gangaram v. Secretary of state 20 Bom. 798; Hanmantrao v. Secretary of state 25 Bom. 287; Bhagwansingh v. Secretary of State 10 Bom. L. R. 571.

Madras,¹ and Allahabad² High Courts have held that prior possession is sufficient title as against the trespasser or one who has no title. The Calcutta High Court has held that the plaintiff must prove title if he brings his suit more than six months after the date of dispossession, and mere previous possession for any period short of the statutory period of twelve years will not entitle him to a decree for recovery of possession even if the defendant could not establish any title to the disputed land.³ It is submitted that the view of the majority of High Courts is in consonance with the English rule that a person in possession has perfectly good title against all but rightful owner.⁴ But it has been held in recent Patna Case that Court under this section has no jurisdiction to pass a decree in favour of plaintiff who claims an undivided share in property from which he and his co-sharers were ousted as such possession is not contemplated by this section.⁵

No appeal or Review.—No appeal lies from an order passed in execution of a decree in a suit under this section.⁶ An application in execution proceedings is included in the term “suit” in this section.⁷ There can be no review of a proceeding under this section; but then an application for a rehearing under o. 9. r. 13 (old S. 108) of the C.P.-Code is not barred by the last sub-clause to this section; a rehearing, on an *ex-parte* decree being set aside, is not a review.⁸ Ordinarily the High Court does not interfere in revision against an order

1 Mustappa v; Sautha Pillai 23 Mad 179; Narayanrow v Dharamcher 26 Mad 514.

2 Wali Ahmed v Ajudhia Kandu, 13 All 537 (F; B); Gobind Prasad v; Mohan Lal 24 All 157; Umrac Singh v; Ramji Das 36 All 51.

3 Nisa Chand v; Kalicharan 26 Cal. 272.

4 (1907) A. C. Perry v Clissold,

5 Vilayi Sannaya v Sannaya Jalu Ramesan AIR 1940 Pat 197.

6 Thomas Souza v Gulam Moideen 26 Mad 438; Kaniyalal Ghose v Jatindra Nath Chandra 45 Cal 519; Tota Ram v Shibban Lal (1932) 13 Lah 798,

7 Kaniyalal Ghose v Jatindra Nath Chandra 45 Cal 519.

8 Andreu. v Duront 4 Mad 217; Umarchand 12 W. R. 229.

under this section for another remedy only by a suit is open to the aggrieved party,¹ but then the High Court can interfere in revision in a proper case.²

Revision.—Mere error of law, *e. g.*, landlord cannot sue for dispossession of the tenant, is a ground for revision.³

Invalid defences.—It may be noted that the following have been held not to be valid pleas in defence to possessory action under S. 9.

(i) That the Magistrate has made an order in favour of the defendant under S. 145, Cr. P. Code ; this is because the object of that section is not to restore possession but merely to maintain it whether it be rightful or not.⁴

(ii) That the defendant has a better title provided the plaintiff's possession is not that of a trespasser.

(iii) That the defendant was acting as an agent of a third person.⁵

(iv) That the plaintiff mortgagee got the mortgage and possession from the defendant mortgagor by fraud.⁶

(v) That the property in question forms a part only of a larger one.⁷

(vi) That the previous suit brought in a Mamlatdar's Court for possession was dismissed.⁸

Crops.—If the person dispossessed, gets a decree for possession of his land, he is entitled to any crops growing thereon. He can cut them.⁹ He has a further right, *viz.*, his decree for possession enables him to get a decree for mesne

¹ Ram Kissen Das v Jaikissen Das 33 All. 647=8A. L. J. 791.

² Ram Dayal v Upendranath 17 C. W. N. 501.

³ Shyama Charan v Mahomed Ali 13 C. W. N. 835=10 C. L. J. 30

Bindu Bashini v Srimati Jahnavi 13 C. W. N. 303

⁴ Chaitan Chnder v Brojo 20 W. R. 12

⁵ Varivandas v. Mahomed 5 Bom. 203.

⁶ Sayali v Ramji 5 Bom 486

⁷ Umachandra 12 W. R. 229.

⁸ Ramchandra v Narasinha 24 Bom. 251.

⁹ Shirajdi v Imambux 13 W. R. 104

profits collected by the person while in wrongful adverse possession, unless the defendant proves a better title. ¹

Mesne profit--A claim for mesne profits cannot be joined with a claim for possession and the decree should be confined to directing delivery of possession² and should not contain an award of mesne profits³ for it is a relief depending on title. A court cannot order removal of structures erected by defendant.⁴

Effect of decree.--A decree in a suit for possession is *prima facie* evidence of title as against a stranger.⁵ The effect of a decree under S. 9 is that a person who is dispossessed otherwise than in due course of law is entitled to be reinstated even if the defendant be a true owner or a person authorised by or claiming under him. But a decree in such a suit will not have the force of *res judicata* on the question of title.⁶

Pending suit.--If a suit under this section is pending, a concurrent suit under S. 39 for cancellation of a deed of gift is not bad.⁷

S. 145. Criminal Procedure Code, compared—Under S. 9 of this Act, the Civil Court is authorised to restore a party into possession if he has within the last 6 months been dispossessed without his consent, otherwise than by due course of law, where as the Criminal Court can only maintain a person in possession if he is found to be in such possession upon the date of institution of proceedings under S. 145, Cr. P. Code, or if he was in possession within 2 months antecedent to that date.⁸ A Magistrate is not incompetent to proceed under S. 145, Cr. P. Code, with regard

1 Radhachurn v Zamuronisa 11 W. R. 83.

2 Tilak Chandra v Fatik Chandra 25 Cal. 805.

3 Ma Ngwe Bwin v Maung Po Maing (1927) 5 Ran. 123

4 Sona Miya v Prokashchaunra AIR 1940 Cal 464; 44 C.W.N. 895

5 Kaliash Chandra v Gajendra Nath 15 C. L. J. 1

6 Narayanrow v Dharamchar 26 Mad 514

7 Joy Gopal Mukerji z Lobit Mohun 26 All 259

8 Lolu Mohun v Guraj Chand 28 Cal 709

to properties which form the subject-matter of a pending suit under S. 9, Specific Relief Act.¹

The existence of an order passed under S. 145 of the Code of Criminal Procedure is no bar to the institution of a suit under S. 9 of the Specific Relief Act for recovery of possession of the same land.²

Distinction between Ss. 8 and 9—S. 8 provides that a person entitled to the possession of a specific immoveable property may recover it in the manner prescribed by Civil Procedure Code, *i. e.* to say, by suit for ejectment on the basis of title ; while this section gives a summary remedy to a person who has been dispossessed of immoveable property, otherwise than in due course of law, for recovery of possession, without establishing title, provided that his suit is brought within 6 months of the date of dispossession. The two sections give alternative remedies and they are mutually exclusive. If a suit is brought under this section, no question as to title can be raised or determined. He may bring a suit for possession on the basis of his title under S. 8. But he cannot combine the remedies provided by both sections in the same suit.

Suit on title—If a plaintiff brings a suit for possession on the basis of title and fails to establish it, his suit cannot be converted into a suit under S. 9 and he cannot be granted a decree under the first paragraph of this section.³

Pleadings—A court should, in all cases in which this section applies, give effect to its provisions whether that is expressly pleaded or not.

(b) Possession of moveable property.

10. **Recovery of specific moveable property.**—A person entitled to the possession of specific move-

1 Kishori Lal Rai v Srinath Rao 36 Cal 370

2 Jwala v Ganga Prasad 30 All 331 U Kyaw Lu Shwe 6 Ran 667

3 Lachman Sham Churn 33 All 64; Ganesh Rai v Bhubi Rai 46 All 903

able property may recover the same in the manner prescribed by the Code of Civil Procedure.

Explanation 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom ~~the~~ trustee is entitled.

Explanation 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

ILLUSTRATIONS.

(a) A bequeaths land to B for his life, with remainder to C. A dies. B enters on the land, but C, without B's consent, obtains possession of the title-deeds, B may recover them from C.

(b) A pledges certain jewels to B to secure a loan, B disposes of them before he is entitled to do so. A without having paid or tendered the amount of the loan, sues B for possession of the jewels. The suit should be dismissed, as A is not entitled to their possession, whatever right he may have to secure their safe custody.

(c) A receives a letter addressed to him by B. B gets back the letter without A's consent. A has such a property therein as entitles him to recover it from B.

(d) A deposits books and papers for safe custody with B. B loses them and C finds them, but refuses to deliver them to B when demanded. B may recover them from C, subject to C's right, if any, under S. 168 of the Contract Act, 1872.

(e) A, a warehouse-keeper, is charged with the delivery of certain goods to Z, which B takes out of A's possession. A may sue B for the goods.

NOTES.

The object of the section—This section provides means whereby a person entitled to the possession of specific moveable property may obtain possession thereof. It embodies the English Common Law doctrine of *detinue*, but the

relief had by this form of action was not quite perfect and complete as could be had in equity. The relief sought by the plaintiff is the specific recovery of chattels wrongfully detained from the person entitled to the possession though of course the prayer for damages for wrongful detention, may be added. The gist of action is the wrongful detention, and it is immaterial whether the defendant originally obtained the goods by lawful means or otherwise. The wrong complained of is the detention. It is enough if the plaintiff is entitled to immediate possession. There is no cause of action to sue under S. 10 unless there is a wrongful detention one adverse to the plaintiff, so as to prevent him from being in possession of them; there must have been a demand by the plaintiff and a refusal by the defendant. In order to entitle the plaintiff to obtain delivery of specific movable property by suit and enforce in decree so obtained by stringent method provided in order 21 rule 31 Code of Civil Procedure, it must be alleged in plaint that defendant is in possession of specific property prayed to be possessed.'

The plaintiff must be entitled to the possession of the property:—The wording of the section read with the two explanations makes it clear what kind of title to possession is necessary to enable a person to sue; the plaintiff need not be the full owner; he can come under S. 10 if he is entitled to immediate possession even as a trustee (to the extent of the beneficial interest in which the person for whom he is a trustee is entitled), or is having a merely special or temporary right to the present possession thereof. He can sue under S. 10 though the goods may never have been taken out of his possession. For an analysis of the "right to possession" attention is drawn, to *Williams* on "personal property" and *Pollock* on "Possession." A person may be entitled to possession either because of his (i) ownership or (ii) independently of ownership because of a temporary or special right, e. g., as a trustee, bailee, pawnee, etc. This

1. *Jaldu Venkata Subarao V. A. S. N. Co. Ltd.* 29, M. L. J. 342 = 30. I. C. 830.

appears from the illustrations to this section which are discussed in detail below; these special rights may arise either by an act of the owner, *e. g.*, a bailment or lien, or may arise independently of it, *e. g.*, in the case of a finder of lost goods, who has a right to keep them, against all except the true owner. In the case of a simple bailment though the legal possession is with the bailee, the bailor (owner) has a right to possession of the same, as against third persons but in case of pawn or hire which is another species of bailment, the bailor has no right to possession which is during the continuance of the bailment vested in the pawnee or the hirer and it is he alone who can sue under S. 10; so also in the case of a lien, the right to possession of the owner is temporarily vested in the lienor.

Property must be specific—The section speaks of recovery of specific goods; they must be ascertained and capable of identification; they must be capable of being seized and delivered up to the winning party; the nature of the thing must continue to be the same. S. 10 does not therefore apply if the relief is sought in respect of a sum of money or a quantity of grain unless they be specifically distinguished from other property of the same kind, *e. g.*, by being placed in definite bags.

Moveable Property—This term means property of every description except immoveable property; for definition of this latter term...see *supra*.

Recover—The form of relief given by S. 10 is applicable only where the property itself is recoverable, *in specie* i. e. the very property itself; the relief given is limited to the delivery of the goods; this section does not apply if the property has from any cause ceased to be recoverable and the relief sought is damages for trespass only, as in case of loss or misappropriation.

The manner prescribed by the C. F. Code—The plaint for specific Movable property should be in form No. 32

1. *Fadu Jhala v. Gour Mohun Jhala* 19 Cal. 556 (F. B); *Murargesa v. Jatheram* 22 Mad. 478.

as given in Schedule No 1 appendix A of Civil Procedure Code. The decree is in the form given in O. 20, r. 10 of the Code. ... "When the suit is for moveable property—if the decree be for the delivery of such property, it shall also state the amount of money to be paid as an alternative if delivery cannot be had." This decree is executed in the mode prescribed in O. 21, r. 31:—“(a) by the seizure, if practicable of the moveable, or share and by the delivery thereof to the party to whom it has been adjudged or (b) by the imprisonment of the judgment debtor or by attaching his property or (c) by both imprisonment and attachment if necessary. Though the decree states the amount of money to be paid as an alternative if delivery cannot be had, yet the defendant has not, as he has in England the option to pay damages and retain the goods; this is clear from the wording of the rule relating to the enforcement of such a decree. It may be noted however that a person entitled to the delivery of movable property is not bound to sue for the delivery of the property itself; he may sue for its value.¹

Illustration (a) Title deeds.—This is based on Lord Buckhurst's case. It is resorted to when a person being entitled to custody of title deeds claims actual delivery of these; the title deeds referred to are unexceptionable ones; if they are void or voidable the plaintiff can have relied under S. 35 or 39 of this Act (rescission or cancellation). This forms a part of equity jurisdiction for the remedy at law is defective. The person who has the legal estate is generally entitled to the custody of the deeds; if the plaintiff has only an equitable estate the trustee would be entitled to it for the benefit of all the persons interested.³ It is often said “the right to title deeds follows the right to the land” In the case of coparceners, one may keep them with him with the consent of others; while suit is pending, the court may determine who is to have custody of the deeds pending the litigation ; A .

¹ Bhoonajee v. Mst Saraswati. 75 I. C. 833=A. R. 924 Nag 176.

² Co. Rep 2 N. S. 10.

³ Duncombe v. Mayor 3 Ves. 320.

Court of equity in giving delivery of deeds to a person can impose terms upon him *i. e.*, compel him to do equity if he seeks equity. A court of equity sometimes helps a person though he is not entitled to possession of the title deeds: this is when there is danger of loss of the deeds in the custody of the person in possession and the claimant has a near interest therein. This can be done even by an injunction.¹

Illustration (b)—Pledge.—This is based on *Donald v. Suckling*.² It relates to bailments. The illustration indicates a case where an owner is not necessarily entitled to the immediate possession of the goods bailed: No doubt bailee is responsible for his wrongful disposal; but then bailor cannot sue under S. 10 for he cannot be said to be entitled to immediate possession till the amount due is tendered.

Illustration (c)—Letters.—An addressee is really the person entitled to immediate possession and so he can sue even the writer under S. 10, though, it may be that the property in the letter may be the sender's;—who has his own reciprocal wants against the addressee.³

Illustration (d)—Finders of goods.—Ss. 163-170 of the Indian Contract Act lay down the rules as to rights and liabilities of a finder of goods; he has indeed his rights to compensation and even lien; but subject to this the owner has a right to immediate possession which he can enforce under S. 10,

Illustration (e)—Warehouse-keeper.—This speaks of a case where a person has a special or temporary right to immediate possession not coupled with absolute ownership; there are cases where there is a special right to immediate possession though active possession may have been voluntarily parted with or where there has never yet been actual possession. This illustration is an instance of bailment. A as a bailee has the temporary right of possession and he is entitled to bring a suit under the present section. In this case, the bailor also can bring the suit against B; as provided in

¹ *Leathes v. Leathes* 5 Ch. D. 221.

² *Donald v. Suckling* L. R. 1. Q. B. 585.

³ *Oliver v. Oliver* 32. L. J. C. P. 47.

section 180 of Indian Contract Act, which clearly lays down that both the bailor and the bailee can bring the suit against the third person who derived the bailee of the use or possession of goods.

11. *Liability of person in possession, not as owner, to deliver to person entitled to immediate possession*—Any person having the possession or control of a particular article of moveable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to the immediate possession, in any of the following cases:—

(a) when the thing claimed is held by the defendant as the agent or trustee of the claimant;

(b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed;

(c) when it would be extremely difficult to ascertain the actual damages caused by its loss;

(d) when the possession of the thing claimed has been wrongfully transferred from the claimant.

ILLUSTRATIONS.

Of clause (a). A proceeding to Europe, leaves his furniture in charge of B as his agent during his absence. B without A's authority, pledges the furniture to C, and C, knowing that B has no right to pledge the furniture, advertises it for sale. C may be compelled to deliver the furniture to A, for he holds it as A's trustee.

Of clause (b). Z has got possession of an idol belonging to A's family; and of which A is the proper custodian. Z may be compelled to deliver the idol to A.

Of clause (c) A is entitled to a picture by a dead painter, and a pair of rare China vases, B has possession of them. The articles are of too special a character to bear an ascertainable market-value. B may be compelled to deliver them to A.

NOTES.

Scope—The object of this section is to provide a special remedy for a case where a person not being the owner of a particular specific moveable keeps possession thereof as against a person entitled to immediate possession, where he occupies a particular position, e. g., as agent or trustee of the plaintiff, or if the possession is wrongfully acquired, or if pecuniary compensation cannot be calculated or ~~would~~ afford adequate relief. The plaint should be in form No 39 given in Schedule Appendix A of Civil Procedure Code.

Difference between S. 10 and S. 11—Under S. 10 the relief given is in the ordinary course prescribed by the C. P. Code, the decree being framed under O. 20, r. 10 and executed under O. 21, r. 31. Under S. 10, a person entitled to the specific moveable property, may sue for possession of the same or in the alternative for compensation. Under S. 11 special relief is given in the four classes specially enumerated and the decree is executed under O. 21, r. 32 (1); again a suit under S. 11 cannot be brought against the owner of the particular moveable; an owner cannot be sued: whereas under S. 10, as appears from the illustrations to that section, a person having a temporary or special right to possession can proceed against the owner of that article; again the means of enforcing decrees under the two sections differ; the court can bring a greater amount of coercion against the defendant to force its decree under S. 11 than it can in case of a decree under S. 10.

Clause (a)—The illustration to this clause is based on the leading English case on the point.¹ Even in England since early times relief is given by means of a decree for specific delivery when the defendant standing in a fiduciary relation to the plaintiff has obtained possession by abuse of his powers: The relief is given though the article may have no peculiar value.

Clause (b)—The illustration is the case of *North v. G. N. S. Ry. Co.*² and the rule is deduced from *Pusey v.*

¹ *Wood v. Rowcliffe & Phillips* 332:1 2 *North v. G. N. Ry. Co.* 2 Giff 64

*Pusey*¹. Ordinarily in the case of a moveable, one can easily ascertain its intrinsic value and that sum is deemed a full compensation for it but it is a matter of common knowledge that articles of curiosity or antiquity and articles of family interest or those connected with events in family history, *e. g.*, heirlooms, family idols, &c., cannot be represented by a sum of money to be given as damages; the only recourse for a court of equity in such cases is to compel their actual delivery. Indeed the actual value may at times be easy of calculation; but then that value would not be its real value to the family to whom it belongs. In *Pusey v. Pusey* the heir sued to recover a horn with an inscription thereon which for centuries had been the token by which the family estate was held and the special relief was given: As observed by Lord Ellenborough² "in all cases where the object of the suit is not capable of compensation by damages it would be strange if the law of this country did not afford any remedy. It would be great injustice if an individual cannot have his property without being liable to the estimate of people who have not his feeling upon it." The ground of jurisdiction is the same as that upon which the specific performance of an agreement is enforced, *viz.*, that the specific thing is the object and damages will not afford an adequate compensation.³

Clause (c).—This clause covers cases where the article is such that no two men would value it at the same price, *i. e.*, it is well nigh impossible to estimate the real damage, as in case of articles of curious workmanship. *Duke of Somerset v. Cookson*, is the leading case on the point. The illustration is based on *Falck v. Gray*⁴ but then specific delivery will not be ordered if the value has been agreed upon.⁵

Clause (d).—In cases falling under this class it is not necessary that the article must have a particular intrinsic value nor that the defendant should be in fiduciary relations

1 *Pusey v. Pusey* 4 L. C. 890. 1 son L. C. 892.

2 *Fells v. Read* 3 Ves 71. 4 *Falck v. Gray* 4 Drew 653.

3 *Duke of Somerset v. Cook* 1 5 *Douling v. Bekjeman* 2 J & H 544

with the plaintiff; the question is as to the way in which the plaintiff lost possession of the article; all that is necessary is that the possession must have been transferred wrongfully by a tort under such circumstances that no property therein could pass. The fact that the defendant had no notice of the tort is immaterial: this is analogous to the relief given under S. 9 as to immoveables. If a landlord takes from his tenant his farmstock in violation of the terms of his contract he would have to restore the same to him¹.

Having possession—In order to entitle the plaintiff to obtain delivery of specific moveable property, it is necessary that he should allege and prove facts which give him right to compel the delivery of the specific moveable besides proving that the defendant is in possession².

CHAPTER II

OF THE SPECIFIC PERFORMANCE OF CONTRACTS

The scope and purpose of this Chapter—This will be best understood by the following extract from the statement of objects and reasons of the Bill.

"It attempts to codify the English Law on the object of specific performance with the following modifications:—

6. Subject to the negative rules afterwards set forth in this Chapter the Bill empowers the Courts to decree specific performance of any agreement when the parties have expressly agreed in writing that specific performance thereof may be required by either of them or that damages shall not be considered adequate relief. This novel provision taken from the N. Y. code is one of the means by which the bill proposes to extend a useful jurisdiction, one peculiarly adapted to India where the alternative relief for a breach of contract, *viz.*, damages, is owing to the poverty of the bulk of the population and the difficulty of executing money decrees, often so utterly nugatory.

7. In England it has more than once been ruled that the Court of Chancery will not compel specific performance of a continuous duty extending over many years. The Bill renders

1 Nutbrown v. Thornton 10 versy. 150.

2 Venkataswami Rao v.

The Asiatic Steam Navigation Co. (1916) 39 Mad (F. B.)=30

I. C. 840=29 M. L. J. 342

this doctrine more precise by declaring that an agreement the performance of which necessarily involves performance of continuous duties over a longer period than 5 years from its date shall not be specifically enforced; whether this is the best limit of time will be a point for consideration before the bill is passed. (Under the Act the limit is 3 years.)

8. With regard to specific performance of contracts to execute buildings or to cultivate lands the Bill is intended to express the present law.

9. The rules as to when a contract for the sale of a married woman's estate will be specifically enforced are in England excessively complicated. The Bill makes no distinction in her case and thus recognizes the principle embodied in S. 4 of Indian Succession Act and Act III of 1874. (Married Woman's Property Act.).

11. The absence in India of any enactment resembling the Statute of Frauds, Ss. 1, 3, 4, 17 renders it unnecessary to embody in the Bill the intricate rules of the Court of Chancery as to when a parol agreement relating to land will and when it will not, be specifically enforced.

12. It seems impossible to elicit a consistent doctrine from the English decisions as to the rights of a purchaser or lessee to specific performance with abatement or compensation when the title of the persons agreeing to sell or lease is defective. The bill lays down that only in one case can such relief be granted, *viz.*, where the part of the agreement which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money. This will relieve the courts from the exercise of a duty which in many cases must be more a matter of guess than of judicial discretion.

13. The right to enforce a contract specifically may in England be lost by delay in resorting to the court and a large mass of cases exist relating to this doctrine. The Bill contains no rules on the subject, for in India the provisions of the Limitation Act that suits for Specific Performance must be brought within 3 years from the date on which the plaintiff

has notice that performance is refused, renders the doctrine of laches inapplicable to this kind of litigation.

14. It seems to be erroneously supposed by some of the *moftusil* judges that when a contract is proved the grant of a decree for specific performance is a matter of course; care has been taken in this chapter to show distinctly that the grant of such decrees is purely within the sound discretion of the court.

15. As in this country all remedies on an agreement can be granted by one and the same court it is conceived that only one suit should lie on account of its non performance. It has on this account been provided in S. 29 that if a suit for specific performance is dismissed, no other suit shall be brought on the same agreement."

Contract—This chapter applies only if the agreement between the parties is a perfect one—amounting to a contract, under S. 10, Indian Contract Act. S. 4 (a) of this Act clearly says that nothing in this Act shall be deemed to give any right to relief in respect of any agreement which is not a contract. All void agreements are excluded from this relief of specific performance; the primary question therefore, for the court in every case is, *whether the agreement in questions is a contract or not?* The chapter presupposes that the agreement is between persons competent to enter into it and is with their free consent and founded upon consideration that is not unlawful; contracts that are merely voidable are not excluded from the operation of the chapter, but then the party entitled to avoid it, must have elected to treat it as a valid contract. A person emerging from a state of disability can take up and carry on transactions commenced while he was under disability in such a way as to bind himself as to the whole.¹ The Legislature requires that there must always be a contract before the court; it must be complete.²

Unregistered document—Part Performance—It has already been noted under S. 4 that no relief can be given so

¹ *Griggson v. Udai Aditya* 17 Cal 223 (P. C.)

² *Kailash Chunder v. Tarini Mohan* 10 Cal. 588; *Mayaram v. Pragdat* 5 All 44.

as to affect the operation of the Registration Act. In England a Court of Equity is allowed to decree specific performance in spite of the Statute of Frauds (which requires a writing in certain cases), e.g., where contract is partly performed by the plaintiff, or if the agreement could not be put into writing because of the defendant's fraud, or if it would be against conscience to insist on the want of writing as a bar to relief etc. On similar principles it has been held by the Judicial Committee in *Mahomed Musa v. Aghore Kumar Ganguli* that when a document requiring registration was not registered, the defect of want of registration was cured by the acting and conduct of the parties who for more than 30 years had acted upon it; in this case a compromise agreement requiring registration was not registered but all the parties had treated the compromise as binding on them and acted upon its terms. It was held that the defects in the form were cured by the conduct of the parties continually acting upon the agreement. Their Lordships referred to *Maddison v. Alderson*² and quoted with approval the observations of the Lord Chancellor "the matter has advanced beyond the stage of mere contract; and the equities which arise out of the stage which it has reached cannot be administered unless the contract is regarded."

Specific performance in case of land outside jurisdiction—A court of equity in England can decree specific performance in cases of land outside its jurisdiction if both the parties to the agreement are resident within its jurisdiction on the maxim that *equity acts in personem*; But courts in India, it must be noted, will not give such a decree (but then even in India a court can pass a money decree in such cases³).

A in Calcutta agreed to sell to B certain lands situated outside the original jurisdiction of the High Court; A failed to perform the contract; on a suit by B it was held that the suit was a "*suit for land*" and so the court had no

¹ *Mahomed Musa v. Aghore Kumar Ganguli* 42 Cal 801, 421 A I

² (1883), 8 A C 467

³ *Shrinath v. Kelidas* 5 Cal 32

jurisdiction to try the same under Cl. 12 of the Letters Patent; But the case would be different if A the vendor were to bring a suit for specific performance of the contract and to recover the agreed price for in that case the suit would not be a suit *for land*.²

Under S. 16 of the Civil Procedure Code which section applies to all courts except the Chartered High Courts, (the extent of the jurisdiction of the Chartered High Courts of Calcutta, Madras, Bombay, Ailanabad, Lahore, Patna and Rangoon is defined by the Royal Charters under which they were established. See Cl. 12 of the Charter of the Calcutta, Madras and Bombay High Courts for their jurisdiction on the Original Side) suits for the recovery of immoveable property must be instituted in the court within the local limits of whose jurisdiction the property is situated.

Specific performance of a contract by a minor—

Specific performance of a contract entered into by a minor—a question of considerable importance and interest may be dealt with at this stage. It is now clear after the decision of the Judicial Committee in *Mohori Bibi v. Dhurmodas Ghose*³ that a minor's contract is void; since a minor's contract is absolutely void there can be no question of specific performance of a contract which a minor has entered into.

In *Mir Sarwarjan v. Fakhruddin*¹, a guardian of a minor's estate entered into a contract for the purchase of certain immoveable property on the minor's behalf; on a suit by the minor it was held by the Judicial Committee that it was not within the competence, either of the manager of the minor's estate or of the guardian of the minor, to bind the minor of the minor's estate by a contract for the purchase of immoveable property; that as the minor was not bound by the

¹ Land Mortgage Bank 1 Cal 3-8

² Nagendra Nath 49 Cal 670;
for what is a "suit for land"

see the recent Full Bench case

of Hatimbhai v. F. E Dins-
haw 29. Bom. L. R. 498.

³ Mohori Bibi 30 Cal. 539 (P. C.)

² Mir Sarwarjan v. Fakhruddin
39 Cal 432

contract; there was no mutuality; and that consequently the minor could not obtain specific performance of the contract.

The case however would be different if the guardian of the minor is *competent* to enter into the particular contract on behalf of the minor. A certified guardian of a minor (whose powers are governed by the Guardian and Wards Act) entered into a contract for the sale of certain immoveable property of the minor with the sanction of the court; on the defendant's failure to pay the purchase price and complete the sale, the property was sold by auction at less than the covenanted price; it was contended relying on the Privy Council case of *Mir Sarwarjan v. Fakhrudin* that the plaintiff could not make a valid contract for sale of the immoveable property on behalf of the minor: The High Court of Allahabad held that such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the minor.

Specific performance can be of executory contracts—The expression 'specific performance,' as applied to suits known by that name, presupposes an executory as distinct from an executed agreement, something remaining to be done such as the execution of a deed or a conveyance, in order to put the parties in the position relative to each other, in which by the preliminary agreement they were intended to be put.¹

The court will not decree a suit for specific performance of an agreement, if it finds that at the date of suit the plaintiff cannot complete the agreement by doing what remained to be done by him under it.

Though when a contract is alleged to be contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and accepted without qualification and it appears that the letters of offer and

¹ *Jatindra Nath v. Shrimat Jeyar* (P. C) 18 Bom L. 2 209; *Woolverampton and W Isall Railway Co v. London and North Western Railway Co.* 16 Eq. 433, 49. relied upon.

acceptance contain all the terms agreed on between the parties at the date of acceptance, the complete contract then arrived at, cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot without the consent of both, get rid of the contract already arrived at.¹

Contents—This chapter (Ss. 12-30) covers the following topics :—

- (i) Which contracts can and cannot be enforced at the discretion of the Court (Ss. 12, 21, 22).
- (ii) When specific performance of a part can be had (Ss. 14, 15, 16, 17).
- (iii) Who can and cannot enforce Specific Performance (Ss. 23, 24, 25).
- (iv) Against whom Specific Performance can or cannot be had (Ss. 27, 28).
- (v) *Miscellaneous.*
 - (a) Effect of destruction of subject-matter after agreement (S. 13).
 - (b) Rights of a Vendee against Vendor with imperfect title (S. 18).
 - (c) Liquidation of damages no bar (S. 20).
 - (d) Remedies Specific Performance and damages (Ss. 19 & 29).

The Privy Council has, it is true, interpreted sections of Specific Relief Act both as to substantive law and practice in light of principles recognised by English Courts but where there is express divergence, this Act will be strictly adhered to, whatever may be English Law.²

¹ Perry v. Suffields Limited (1916) 2 Ch. D. p. 187.

² Ardeshtir Manna v. Elora Jason (1928) 55 I. A. 360; 52 Bom. 597, 11 I C 413; A. I. R. 1928 P. C. 208;

Akshyalingen v. Avayambal (1932) 56 Mad 796; 1149. I. C. 621; A. I. R. 1933 Mad. 286.

(a) Contracts which may be specifically enforced

12. Cases in which specific performance enforceable.—Except as otherwise provided in this chapter, the specific performance, of any contract may in the discretion of the court be enforced—

(a) when the act agreed to be done is in the performance, wholly or partly, of a trust ;

(b) when there exists no standard for ascertaining the actual damages caused by the non-performance of the act agreed to be done ;

(c) when the act agreed to be done is such that pecuniary compensation for its non performance would not afford adequate relief ; or

(d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done,

Explanation.—Unless and until the contrary is proved, the court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money. (But where there is evidence that money compensation would be adequate, specific performance cannot be decreed,)¹ and that the breach of contract to transfer moveable property can be thus relieved.

ILLUSTRATIONS.

Of clause (a). [A holds certain stock in trust for B. A wrongfully disposes of the stock. The law creates an obligation on A to restore the same quantity of stock to B and B may enforce

¹ *Ramji v. Rav Kishoresingh* 57 Cal. 509.

specific performance of this obligation]. This illustration is repealed wherever the Indian Trusts Act II of 1882 is in force.

Of clause (b). A agrees to buy, and B agrees to sell, a picture by a dead painter and two rare China vases. A may compel B specifically to perform this contract for there is no standard for ascertaining the actual damage which would be caused by its non-performance.¹

Of clause (c). A contracts with B to sell him a house for Rs. 1,000. B is entitled to a decree directing A to convey the house to him on paying the purchase money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a Railway Company contracts with Z to make an archway through their Railway to connect lands of Z severed by the Railway to construct a road between certain specified points, to pay a certain annual sum *towards* the maintenance of this road and also to construct a siding and a *wharf* as specified in the contract; Z is entitled to have this *contract* specifically enforced for his interest in its performance cannot be *adequately* compensated for by money; and the court may appoint a *proper* person to superintend the construction of the archway, road siding and wharf.²

A contracts to sell and B contracts to buy, a certain number of Railway shares of a particular description. A refuses to complete the sale; B may compel A specifically to perform this agreement for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a share-holder, which cannot otherwise be procured.

A contracts with B to paint a picture for B who agrees to pay therefor Rs. 1,000; the picture is painted. B is entitled to have it delivered to him on payment or tender of Rs. 1,000.

1 (The China Vases are suggested by *Faick v. Gray* (1853) 4 Drew 651; 176 R. R. 493)

2 . See *Stover v W R Co* (1842) 2 Y & C. C. 48; 60 R R 23)

Of clause (d). A transfers without endorsement, but for valuable consideration a promissory note to B. A becomes insolvent and C is appointed his assignee. B may compel C to endorse the note for C has succeeded to A's liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless¹.

NOTES.

Contracts—We have seen already that this chapter applies only to agreements which are complete contracts but not to those that are void. The section presumes the existence of a contract in law.

Relief is discretionary with the court—It is not imperative upon a court to decree specific performance of a contract merely because the case falls within any of the four clauses of S. 12; even then as the section says, it *may be granted* at the discretion of the court; S. 22 should be read with S. 12. It says: "the jurisdiction to decree specific performance is discretionary and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable guided by judicial principles and capable of correction by a court of appeal." For further detail, see notes to S. 22. If none of the four grounds stated in S. 12 be established, a court cannot decree specific performance.

Trust—Clause (a)—If a trust is constituted, be it express, implied or constructive, a court of equity would at the suit of a beneficiary enforce its specific performance; that relief is given by this clause. The court would enforce trust not only against those who are rightfully possessed of trust property as trustees but also against all those who come into possession

¹ (Involved in *Watkins v Mavle* (1810)

² J. & W. 242. ∴ There the assignee's endorsement was voluntary and Court answered an objection to its validity by saying that he was not only entitled but bound to endorse.

of the property bound by the trust with notice of the trust. It should be noted that the specific enforcing of trust is different from "specific performance" as used in a strict sense; the latter term ordinarily denotes that jurisdiction which the court exercises in respect of executory contracts as contrasted with executed ones; again, ordinarily it is an alternate remedy, but in case of trusts it is *the only* remedy. The discussion on this point here is now to a large extent academical for the Indian Trusts Act of 1882 has repealed the illustration to this clause, wherever that Act applies. The illustration is taken from *Forrest v. Elwes*². The beneficiary has the option either to have the stock replaced or the money produced by it with interest, but he cannot insist upon repugnant claims. For details see *Story's Equity Jurisprudence*.

No standard for ascertaining damage—Clause (b)—The clause differs from cl. (c) below, just as cls. (b) and (c) to S. 11. differ from each other. As *Story* puts it, the ground of the rule is the utter uncertainty of any calculation of damages as they must in such cases be in a great measure conjectural: The clause covers cases where the subject-matter is so unique that it would be impossible to say what it would fetch in the market. The illustration is based upon *Falck v. Gray*,³ which was a case of a contract to sell two ancient jars.

The agreement to retire from business can be specifically enforced. Where an agreement was that partnership book was on dissolution of the partnership to be the property of one partner and others were to have a copy of it, the agreement as to copy was specifically enforced.⁴ So also where the agreement was to sell several specified stones in old Westminster Bridge when it was pulled down.⁵ And where the agreement was as to the artists' picture painted by himself

1 *Poolley v. Bud* 14 Beav. 34.

3 *Falck v. Gray* 3 Drew 461.

4 *Gray v. Smith* 43 Ch. D. 208.

2 *Forrest v. Elwes* 4 Vesey 497.

5 *Lingen v. Simson* 1 S. & S. 300.

6 *Thorn v. Commissioners of Works* 23 Beav. 490.

the picture having its peculiar value to the plaintiff.¹ So also where the agreement was by a partner not to carry on the same trade with other person in a certain place.² As also where the contract was for the sale of 800 tons of iron to be paid for by instalments; this was on the ground that profits depended on future events and so calculation would proceed on pure conjecture. This decision is adversely criticised by Mr. Fry.³

Damages would not afford adequate relief—

Clause (c)—The explanation to the section should be read with this clause: It refers to this clause. It lays down an important rule—a *presumption* for the guidance of a court of Equity.—The explanation does not proceed on any distinction between real and personal property. The true ground for the relief of specific performance is the need of it to afford an adequate remedy: ordinarily each plot of land as *Story* says, has to the purchaser some peculiar and special value by reason of its position or quality or the use he intends to make of it for which damages would not be a true satisfaction, while it is otherwise on a sale of stock or goods as with the damages he may ordinarily purchase the same quantity of the like stock of goods: But then it should be noted that the explanation does not lay down a rule of law; the presumption⁴ is not conclusive; it is rebuttable but since, it is an obligatory one the *onus* of proving the contrary is on the other side; no relief will be given unless the remedy is mutual and reciprocal.⁵ To put briefly the common law rule is that money is the measure of every loss; but in the case of land damages afford no true compensation and do not attain the desired object which they do in case of moveables; hence the jurisdiction exercised by a court of Equity in the first case. The exceptional cases where breach of a contract for the transfer of immoveable

¹ *Drowing v. Bekjarren* 2 J. 514.
H. 514.

² *Kimbl. v. Kean* 6 Sim. 373.

³ *Adderley v. Dixon* L. S. & S. 607.

⁴ *Ramji Patel v. Rao Kishoresingh*
(1929) 50 C. L. J. 198. (P. C.)

⁵ *Subramanian chattiari v. Arun*
*Chalan A. I. R. 1943 Mad. 761.*²⁰

property can be adequately compensated for by damages are given in S. 21.

The first illustration relates to the ordinary case of sale of immoveables; the 2nd is based on *Storer v. G. W. Ry. Co.*,¹ this also relates to land; the 3rd relates to moveables where as we have seen specific performance is the exception and not the rule; it is the case of *Adderley v. Dixon*² where distinction was drawn between ordinary stock which can be had at any time in the market and Railway shares which being limited in number cannot always be had.

(a) *Contract specifically enforced*:—e. g., a contract for the sale of debts proved in bankruptcy where an assignment of the debts has not been already executed, for the dividends eventually payable out of his estate are purely conjectural; a contract to pay the plaintiff a certain annual sum for his life and also a certain other sum by way of Royalty on a certain measure of a particular article to be manufactured by the defendant during the life of the plaintiff or contract for the sale of an annuity payable out of the dividends of stock³ or contract for the sale of the good will of a trade.⁴ or a contract for a lease or its renewal⁵ or a contract relating to land supposed to contain coal or valuable minerals.⁶

(b) *Not specifically enforced*:—A contract for sale of stock⁷ for building and repair⁸

Pecuniary compensation cannot be got—This clause covers cases of contracts for personal acts and proceedings, e. g., to renew a lease; to invest money in lands and settle on another; to settle boundaries on neighbouring

1 *Storer v. G. W. Ry. Co.* 2 Y. & C. N. R. 48.

2 *Adderley v Dixon* 1 S. & S. 607.

3 *Boll v. Clegge* 1 Bro. P. C. 140

4 *Withy v. Cattle* 1 S. & S. 174.

5 *Bryton v Whitehead* 1 S. & S. 74.

6 *Furnival v. Carew* 3 Atk 83.

7 *Duncutt v. Albrecht* 12 Sim. 189.

8 *New Birbhoom Coal Co. v. Balaram* 5 Cal 175.

9 *Cude v. Rutter*.

10 *City of London v Nash* 3 Atk 511

estates; not to cut down trees; to endorse a bill; to charge an annuity on land.

An Agreement to Mortgage:—Such an agreement is not generally capable of specific performance and even if a decree is passed, it does not relate back to date of agreement.¹

Suit to restore the terms of a lost deed—Where a bond that has been executed is lost or destroyed, the proper course of proceeding is by a suit to restore the terms of the lost bond or as it has been said in courts of equity in England, by a suit to obtain the benefit of the lost deed or writing.²

Building contracts—The general rule in equity was that an agreement to erect a building could not be specifically enforced but where the particulars of a building are clearly specified and the erection of which is of an importance to the other party which cannot adequately be measured by pecuniary damages, the court of equity would order specific performance.³

Hire Purchase Agreement:—It was held that suit was one for specific performance of contract for sale of goods and since failure of B to perform his part of obligations under hire-purchase agreement could be adequately compensated in money, A's suit against B for amount and declaration for remaining instalments, specific performance of contract could not be granted.⁴

13 *Contract of which the subject has partially ceased to exist.*—Notwithstanding anything contained in S. 56 of the Indian Contract Act, a contract is not wholly impossible of performance, because a

1 Waman Mahadeo v Janardhan Balwant 40 Bom. L. R. 425

2 Maya Ram v Prag Dutt 5 All 44

3 Wolverhampton Corporation v Emmons (1901) 1 K. B. 515;

Molyneux v Richard (1906) 1 Ch 34.

4 Abdul Rehman v Mankram Hanuman Bux A. I. R. 1941 Rang Page 177

portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

ILLUSTRATIONS.

(a) A contracts to sell a house to B for a lakh of Rupees. The day after the contract is made, the house is destroyed by a cyclone. B may be compelled to perform his part of the contract by paying the purchase money.

(b) In consideration of a sum of money payable by B, A contracts to grant an annuity to B for B's life. The day after the contract has been made, B is thrown from his horse and killed; B's representative may be compelled to pay the purchase money.

NOTES.

S. 56, Indian Contract Act—A contract to do an act which after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful: According to Indian Law an initial or subsequent impossibility makes a contract void; of course in case of subsequent impossibility if the impossibility was known or could with reasonable diligence have been known to the promisor, the promisor has to make compensation to the promisee.

Reason of this Rule—The select committee that was in charge of the Specific Relief Bill in 1874 said the following while introducing this section: "We have inserted a clause providing that notwithstanding anything contained in S. 56 I. C. Act a contract is not wholly impossible of performance because a *portion* of its subject-matter existing at its date has ceased to exist at the time of the performance; the illustrations appended to this new clause will sufficiently show its propriety."

The object and scope of S. 13—The object of S. 13 is to explain the bearing of a general rule as that in S. 56 I. C. Act upon a suit for specific performance. This section

is a sort of proviso to Sect 56 of The Indian Contract Act. All that this section enacts is that in a proper case there will be specific performance of the portion which is possible for parties to perform and the whole contract will not be void because there is loss or destruction of a portion of the subject matter. Ch. 2 of the Specific Relief Act dealing with contracts does not lay down any rule of substantive law as to the validity or otherwise of a contract; it simply refers to the general law of contracts laid down in the I. C. Act so far as it bears upon the relief of specific performance. As *Story* puts it, this section recognizes the distinction, that if a man has performed so much of the agreement as that he is not in *status quo*, and is in no default for not performing the residue, he shall have a specific performance of the agreement from the other party; whereas if he has done nothing to alter his position and the falling through of the agreement simply leaves him in *status quo ante*, then there is no equity to enforce specific performance:

S. 13 of Sp. R. Act and S. 56 of I. C. Act are not conflicting—From what is said above it is clear that there is no real conflict between the two sections: A perusal *puri pasu* of the sections indicate that S. 56 of the I. C. Act includes also the case of an act becoming, after the contract is made, unlawful and extends the rule in *Taylor v. Caldwell* to all kinds of impossibility; whereas S. 13 of the Sp. R. Act is limited to, where it has become impossible because part of the subject-matter has ceased to exist, S. 13 of the Sp. R. Act was not and is not meant to enable a person to call upon another to do an act which he is not competent to do or to do an immoral act or one against public policy; S. 13 presupposes that the agreement must be a contract enforceable at law. S. 13 purports to deal with one species of impossibility only and to determine who is to bear the loss in case of destruction of portion of the subject-matter it suspends the operation of the general rule in S. 56 of the I. C. Act and throws the loss on the equitable owner (and

not the legal owner). The doctrine underlying it is, that the party making an unqualified promise must stand by it.

Effect of S. 13—As we have seen S. 13 throws the loss on the equitable owner. As to who is an equitable owner, depends as *Fry* puts it, on whether the contract, is completely made or not. If it has been, the person who has contracted to buy the property is the equitable owner, and it is he who bears subsequent loss and is entitled to all subsequent gains; in such a case subsequent events cannot determine the contract nor give either party a right to resist the specific performance thereof: but if it is not completed the owner of the property who is contracting it, i. e., the vendor is the owner both in law and equity. It may be noted that a contract cannot be said to be complete merely because it is signed. It all depends on the nature of the terms; if there is a condition, a contract is not complete till the conditions are performed.

Illustrations—The first illustration is the case of *Paine v. Wellor*¹; it embodies the general rule we have discussed above, of equitable owner bearing the loss and reaping the fruits of subsequent events. The same principle would apply to a contract for share in a company which is afterwards wound up before shares are actually transferred.² Of course, the illustration (a) is incompatible with principles of law enunciated in Sect. 54-55 of Transfer of Property Act. S. 54 of the Transfer of Property Act says that contract for sale of immoveable property does not of itself, create any interest in or charge upon such property and by S. 55 (5) (c) of the same Act the risk of accidental destruction is to be born by the purchaser only when ownership passes to him; of course under the Transfer of Property Act S. 55 ownership passes only on the execution and registration of

¹ *Paine v. Wellor* 6 Vesey 349.

² *Coles v. Bristowes* L. R. 6 Eq. 149; *Emmerson's* L. R. 1 Ch 43.

a proper conveyance, and therefore the illustration (a) to Sect. 13 will have no application where Transfer of Property Act is in force.

The second illustration is the case of *Mortimer v. Caffer* it rests on the general principle by which that which is agreed to be done is considered as actually performed. This is because the purchaser agreed to buy an interest of uncertain duration and he cannot complain that the contingency is uniaavourable to him,

1- Specific performance of part of contract where part unperformed is small.—where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

ILLUSTRATIONS.

(a) A contracts to sell to B a piece of a land consisting of 100 bighas It turns out that 98 bighas of the land belong to A and the two remaining bighas to a stranger who refuses to part with them. The two bighas are not necessary for the use or enjoyment of the 98 bighas, nor so important for such use or enjoyment that the loss of them may not be made good in money. A may be directed at the suit of B to convey to B the 98 bighas, and to make compensation to

him for not conveying the two remaining bighas: or B may be directed at the suit of A, to pay to A on receiving the conveyance and possession of the land the stipulated purchase money, less a sum awarded as compensation for the deficiency.

(b) In a contract for the sale and purchase of a house and lands for two lakhs of Rupees, it is agreed that part of the furniture should be taken at a valuation. The court may direct specific performance of the contract, notwithstanding the parties are unable to agree as to the valuation of the furniture and may either have the furniture valued in the suit and include it in the decree for specific performance; or may confine its decree to the house.

NOTES.

Sect. 14 to 17 are a complete code as to specific performance of a part of contract. Any claim for such relief must be brought within their terms.

15 Specific performance of part of contract where part unperformed is large.—Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the court may, at the suit of the other party, direct the party in default to perform, speci

1 W Graham v Krishnachandra A. I. R. 1925 F. C. 46=27 Bom. L. R.
740 Hiralal v Janardan A. I. R. 1938 Bom. 134

fically so much of his part of the contract as he can perform provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

ILLUSTRATIONS.

(a) A contracts to sell to B a piece of land consisting of 100 bighas. It turns out that 50 bighas of the land belong to A and the other 50 bighas to a stranger who refuses to part with them. A cannot obtain against B a decree for the specific performance of the contract but if B is willing to pay the price agreed upon and to take the 50 bighas which belong to A waiving all rights to compensation either for the deficiency or for loss sustained by him through A's neglect, or default B is entitled to a decree directing A to convey those 50 bighas on payment of the purchase money.

(b) A contracts to sell to B an estate with a house and garden for a lakh of Rupees. The garden is important for enjoyment of the house. It turns out that A is unable to convey the garden. A cannot obtain a decree against B for the specific performance of the contract; but if B is willing to pay the price agreed waiving all right to compensation either for the deficiency or for loss sustained by him through A's neglect or default B is entitled to a decree directing A to convey the house to him on payment of the purchase money.

NOTES.

Reason of the rule—As has been observed by *Fry J.*

a mere difference in quantity has never been held to be a bar to specific performance. The Court of Chancery always drew a distinction between the essential and non-essential terms of a contract and allowed incapacity to perform its non-essential terms to be made the subject of compensation. In a recent Bombay Case, where the vendor had contracted to sell four plots of land, without apportionment of the price of each plot, and it was found that the vendor was unable to carry out the contract regarding one out of four plots, which was held to form a considerable portion of the whole and not a small portion, it was held that the purchaser was entitled to relief only on his agreeing to buy remaining property for stipulated price,¹

Ss. 13, 14, 15, and 26 distinguished—S. 13 relates to the effect of one party to a contract being totally unable to perform his part owing to a particular reason, because of the part of the subject matter having ceased to exist: as we have seen the effect is that the other party is bound to perform his part of the contract, whereas Ss. 14 and 15 provide for a case where a person cannot perform a part of his contract owing to any reason whatever, and the effect as we shall see, depends upon the part unperformed bearing small or large proportion to the part performed, and upon its being compensated in money, and upon whether the suit is brought by the buyer or the seller. S. 14 relates to a case where the part unperformed is small; but it is further necessary that the small part should admit of compensation in money; in that case both can sue for specific performance subject to giving and taking compensation for the deficiency, S. 15 relates to a case where either of the conditions mentioned in S. 14 is wanting, i. e., either the part unperformed bears a large proportion to the part that can be performed or even if it be small it does not admit of compensation in money; in such a case the vendor cannot claim specific performance, but the buyer can have it, provided that he

¹ Hiralal v. Janardan A.I. R 1938 Bombay; 134 = 39. Bom. L. R 1299

relinquishes all claim to further performance and all right to compensation; then again these Ss. 14 and 15 differ from S. 26; in both classes of cases, specific performance when carried out leads to a result different from that provided in the contract, but they differ in this that whereas in cases under S. 26 the variation is in the agreement itself, in cases under S. 14 it is in its application to the subject matter. While reading these sections 14 to 17 in group, a note of warning may be sounded to reader. He must not be influenced by English decisions on the point as our legislature has in several cases clearly departed from English Law. Former decisions of various courts leaning in favour of English decisions have gone on the board.

Joint Hindu Family--The section applies where a member of an undivided family agrees to sell part of the joint property in which he has only a share.¹ S. 15 will apply only where the defendant has no interest in any portion of the property, agreed to be sold or is unable to convey such portion as in illus. (b). Where D as managing member of an undivided family consisting of himself and two others entered into a contract to convey certain land to P, the other members not being parties to the contract, it was held in a suit by P against all the defendants, that D should be directed to convey the entire property without determining whether the sale by him would or would not bind the interests of other defendants in the property.² If an undivided father agrees to sell the family property without the concurrence of his son the decree can be for specific performance of the contract for sale of the whole without determining whether the sale binds the son.³ In case of a contract for sale by defendants on their own behalf and as representing some who are minors, if it be found that the contract is indivisible

1 Inturi Nogiah 14 M. L. T. 199.

2 Kosuri Ramraju v. Ivalury Ramalingam 26 Mad. 74.

3 Srinivasa 32 Mad. 320.

and not binding on the minors, a decree cannot be passed compelling a conveyance of the interest of the minors as well, by the major defendants, but the plaintiff is entitled to take a conveyance by the major defendants, of all their interest in the properties for the purchase money agreed upon without abatement or compensation if he be willing.¹

“The managing member of Joint Hindu family, who for purposes not binding upon the other co-parceners and without their concurrence, agrees to convey a specific item of joint family property, cannot “perform” his contract in its entirety then the case falls within this section. The purchaser in such a case cannot enforce specific performance of the entire contract. But courts will grant specific performance by a conveyance of the share which the vendor had in the property at the date of the contract, if the purchaser elects to pay the entire consideration, and the share should be specified in the decree.”² In this case, the former decisions in *Kosuri Ram-raju*, and *Shrinivas Reddi* were dissented from, and the decision in *Nagiah v. Venkatarama* was approved of.

In Bengal where the parties are not governed by the Mitakshara law, no specific performance can be decreed in respect of a co-parcener's interest—The purchaser's remedy is by way of damages.

Damages—A manager of a Joint Hindu family who has agreed to sell immoveable property belonging to himself and the minor members of the family is personally liable under S. 73 of I. C. Act for damages for failure to perform the contract when it is found that it is not binding on the minors.³

Discretion—Even in a case falling within S. 15, the relief by way of a decree for specific performance is discretionary

1 Rami Reddi 32 Mad. 359; 20 Mad. L. J. 328; Govinda Naiken 37 Mad. 403; Nagiah v. A. Venkatarama 37 Mad. 387.

2 Bolusivami Aiyer v. Laksemana

Aiya 4. Mad. 605 (F. B.); Sit Ram v. Balkishen 6 Lah. 221.

3 Adikesavan Naidu v. M. V. Gurunatha Chetty 40 Mad. 33 (F. B).

and will not be granted where there has been great delay and a consequent change of circumstance.¹

The 1st condition for specific performance of part (viz) Substantial performance of the promise should be possible.—We have already seen the reason of this rule; it is also reiterated by Lord Thurlow² as under. "It is scarcely possible that there may not be some small mistake or inaccuracy as that of lease represented to be for 21 years may be for 20 and 9 months. Some of these little inconveniences that would defeat an action at law and yet lie so already in compensation that they ought not to prevent the execution of contract. The doctrine of equity is that the essence of the contract should be capable of performance."

Illus.—*Illus.* (a) to S. 14 is based on *Macqueen v. Farquachar*³; there a title could not be made to 6 acres out of a large estate and the 6 acres were not material to the enjoyment of the rest.

In *Dyer v. Hargrave*⁴ a farm was described as lying within a ring fence which does not so lie; but the misdescription of the defect being a perfectly patent one known to the purchaser, specific performance was forced.

In *Colcraft v. Rocbuck*⁵ an estate of V 186 acres was described as freehold but as a matter of fact 2 out of these were held from year to year. In *Malsey v. Grant*⁶ the estate was sold free but was afterwards found subject to trifling incumbrance of a small annual charge. In these cases defects were held to be non-essential so as to allow of the contract being specifically performed.

The 2nd condition is—That the part unperformed should admit of compensation in money.—These words mean

¹ Govinda Naicker 37 Mad. 403.

² Morlock Butler 10 Ves. 305.

³ Macqueen v. Farquachar 11 Ves.

467.

⁴ Dyer v. Hargrave 10 Ves. 505.

⁵ Colcraft v. Rocbuck 1 Ves. 221.

⁶ Malsey v. Grant 13 Ves. 27.

that the same should admit of a fair and reasonable compensation. It is a matter of common knowledge that almost all cases where the part which must be left unperformed bears only a small proportion to the whole in value, the non-performance of that part does admit of compensation in money; it should be remembered that so far as a purchaser is concerned, his right strictly speaking is not one to compensation but to abatement of the purchase money for so much as the quantity falls short of the representation. It is only where there is fraud or misrepresentation or where there is no path from which the amount can be fairly ascertained that the courts hold that the subject does not admit of compensation in money; but then the mere fact of difficulty in assessing damages or of a flourishing description is not enough.

Those cases which do not admit of assessment of compensation fall under S. 15.¹

Impossibility of substantial performance how determined—The question whether the part that cannot be performed is essential or not cannot be determined in the abstract; no hard and fast rule can be laid down; it is a question of fact—depending upon the desire of the disappointed party at the date of the contract; *e. g.*, where estate described as being free from encumbrances is heavily incumbered or where a tenure proves to be substantially different from that described or where it has special value to the purchaser. It is needless to repeat here the effect if substantial performance is impossible—the party in default cannot enforce it at all and the other party can only insist on specific performance but that too only of so much of the contract as can be performed and provided he relinquishes all right to compensation and claim to further performance. Even if these conditions are satisfied the plaintiff cannot claim it as of right. The word “*may*” in S. 15 indicates that it is discretionary with the court to grant the relief; the discretion has of course to be

¹ Johnson v. Smart 2 Gif. 151; Magenis v. Fallon Moll 511.

exercised under S. 22. It is clear that if the part unperformed is substantial, it is almost necessarily one not admitting of compensation in money.

Non-performance because of defect in title—

Such a case would come under S. 15; the defect is substantial and incurable; but the case may come under S. 18 if the title though originally imperfect is capable of being made perfect subsequently.

Non-performance of stipulation as to time—

The last topic to be considered is as to how far a stipulation as to time is of the essence of the contract in Equity. The common law rule embodied in S. 55 of the Indian Contract Act is to this effect; if it was the intention of the parties that time should be of the essence of the contract, then the breach of the stipulation renders the contract or so much of it as has not been performed voidable; but if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but then the promisee is entitled to compensation from the purchaser for any loss occasioned to him by such failure; in the first of these cases if the aggrieved party chooses to accept performance at any other time he may claim compensation on giving notice thereof at that time to the other party. This then is the rule of substantive law, but so far as the question of specific performance in such cases *i. e.*; (where the clause as to time is not complied with) is concerned, the rule in S. 55, Indian Contract Act, is supplemented by these sections (14 and 15, of the Specific Relief Act): If time is not of the essence of the contract, S. 14 applies; but if it be of the essence of the contract, the case would be governed by S. 15, *i. e.*; the promisee can, if he likes, have specific performance even after the lapse of time subject to the limitation in the section; but the promisor cannot. It is necessary at this stage to note as held in the leading equity case of *Seton v. Slade*,¹ that equity holds time

¹ *Seton v. Slade* 1 W. & T.

to be *prima facie* non-essential and grants specific performance of agreements after the time for their performance has passed, unless the parties have expressly treated it as of the essence of the contract, or it necessarily follows from the nature and circumstances of the contract. Where the plaintiff agreed to sell certain property to the defendants which was already in their possession, and the defendants paid up the full purchase money to the plaintiff but omitted to take from him a registered sale-deed and where after their right to enforce specific performance of the agreement to sell had become time-barred, the plaintiff sued, to recover possession of the property, it was held, dismissing the suit that the defendants were entitled to remain in possession against the plaintiff.¹

Defect in Quantity.—In *Pears v. Sawbart*² the buyer purchased a plot of land for the purpose of carrying on his business as a wharfinger ; he could not get 2 bighas out of 100 ; but since the two formed frontage to the stream, specific performance as to rest was not allowed against the purchaser. In *Perkins v. Eda*³ seller agreed to pass a house and some acres of land but could not make title to a small strip between the house and the road, so that people in passing could look into the windows : specific performance against the buyer was refused.

In *Tata Industrial Bank Ltd. v. Rustumjee*⁴ the defendants contracted to sell their property at Meadows Street, Bombay, for the sum of Rs. 7,41,000. It was stated by them in the letter of offer that the area of land was, 1,482 sq. yards. Subsequently it was found that the area of the land amounted to 1,281 sq. yards. The plaintiffs informed the defendants that they desired to complete the purchase subject to a proportionate reduction in the purchase-money. The plaintiffs

1 Venkatesh Damodar v. Mallappa Bhimappa 46 Bom. 723.

2 Pears v. Sawbart 7 Beav. 546.

3 Perkins v. Eda 16 Beave. 193.

4 22 Bom. L. R. 849.

thereupon, sued the defendants for specific performance of the contract with compensation for the deficiency of 200 sq. yards. It was held that even if there had been failure on the part of the defendants to perform the whole of their part of the contract, the plaintiff were not, under S. 14 of the Specific Relief Act, entitled to compensation in money for the deficiency, because the part left unperformed was one-seventh in area of the whole of the valueable site and it would be a misuse of the language to say that the part alleged to be unperformed bore only a small proportion to the whole in value ; it was also held that the plaintiffs were entitled to specific performance under S. 15 of this Act, only upon relinquishing all claim to further performance and all right to compensation either for the deficiency or for loss or damage sustained by them through the default of the defendants (*Tata Industrial Bank Ltd. v. Rustomjee* with facts slightly altered).

In a suit for specific performance of a contract to sell even if the plaintiff shows that there was a claim against defendant for maintenance, there would be nothing to put plaintiff on notice and even if defendant sold property, he would still be liable to provide maintenance out of sale proceeds which would retain character of ancestral property. This case comes under section 14 and plaintiff is entitled to compensation for the burden which is imposed upon the property.¹

Defect in Quality—Specific performance against the lessee was refused where the seller agreed to assign an original lease and could give only a sub-lease;² so was it where the buyer of an entirety in that estate was not compelled to take an undivided share thereof.³

Proviso to S. 15—The proviso is applicable only when the buyer is the plaintiff : It seems to have been framed to meet a difficulty created by some English cases and to

1 Chhotabhai Hirachand v. Mangalbhai Naginbhai A. I. R. 1923 Bom. 271.
2 Madely v. Booth 2 De G. and S. 18. | 3 Att. Genl v. Day I. Ves. 218.

adjust equities between the buyer and the seller. The combined effect of the proviso to S. 15 and S. 14 is that the buyer cannot enforce specific performance with compensation except in a case where the seller could equally have enforced specific performance subject to compensation ; in all other cases it must be without compensation.

Departure from English Law—The Indian Legislature has made a deliberate departure from English law in not allowing the purchaser a proportionate abatement in price for deficiency. The proviso only enables the purchaser to enforce specific performance under the named conditions, *i. e.*, on his relinquishing all claim to further performance and all right to further compensation. Where A, one of the joint owners agrees to sell the land in dispute and the other objects to the sale, the purchaser cannot enforce specific performance of the entire contract, but he can do so in respect of A's share provided that he relinquishes all claim to further performance and all right to compensation for the deficiency and is ready to pay the full price agreed upon for the whole land.¹

Relinquishment of Claim:—It is open to the plaintiff under this section to relinquish his claim to any part of the property in suit on the conditions specified in the section at any time before the suit is finally decided by the court of Appeal.²

Splitting up subjects matter by Court:—This section does not enable the court to make a new contract for the parties by splitting up the subject matter and apportioning consideration.³

16. Specific performance of independent part of contract.—When a part of a contract which taken by itself, can and ought to be specifically performed,

¹ Sita Ram v. Bal Kishen 6 Lah. 221,=88 I. C. 472.

² Waryam Singh v. Gopi Chand (1929) 11 Lah. 69.

³ Mahendranath Shrimani v. Kailasnath Das 55 Cal 841=109 I. C. 298.

stands on a separate and independent footing from another part of the same contract, which cannot or ought not to be specifically performed the court may direct specific performance of the former part.

NOTES.

Scope—S. 16 deals with cases where one part of a contract is severable because it stands on a separate and independent footing to the other and the performance of one part is either impossible or undesirable; in such a case one part can be specifically enforced although the other cannot be enforced; this section assumes that the parts of the contract are severable and that the performance of one distinct part becomes either impossible or unlawful. This section must be read to gether with sections 14, 15 & 17 to understand the full significance.

Difference between S. 16 and Ss. 14 and 15—In Ss. 14 and 15 it is the inability as to a part of the contract that is alone contemplated; S. 16 includes the element of illegality, it includes case where a part of the contract though it could, yet ought not, to be specifically performed; to put briefly, it recognizes the distinction between divisible and indivisible illegal contracts.

General rule of Equity—The general rule is laid down in S. 17 (*infra*) which embodies the observations of Lord Romilly, viz.—“As a general rule, the courts cannot specifically perform the contract in piecemeal, but it must be performed in its entirety if performed at all—exception being in case where the contract is divisible parts of which are in themselves distinct wholes.”¹ So then in enforcing specific performance of a part as in S. 16, there is no departure from the general rule.

¹ Merchant's Trading Co. v. Bomer L. R. 12 Eq. 32.

Cannot or ought not be specifically performed—

A contract cannot be specifically performed if it comes within any of the clauses of S. 21; but then even if it does not so fall, it *ought* not to be specifically enforced if it comes within cls. (a) or (b) of S. 22 which vests the discretion in the court. The words 'ought not' are not limited to the ground of illegality; they refer rather to the discretionary nature of the jurisdiction.

Decree under S. 16—The decree makes no reference to the other part of the contract which cannot or ought not to be performed; it is to be passed as if the part were a several contract by itself.

Question of divisibility of a contract—No set rule can be laid down to determine this; it depends on the particular nature of each contract and the terms in which the agreement is couched; but certain rules of guidance are to be found in English cases. A contract for the sale of property in one lot is naturally indivisible' and if the sale is in distinct lots it is usually deemed divisible unless there is a subsequent agreement to the contrary effect, or one is dependent on the other. It is enough if an intention to separate the parts appears in the agreement. In case of executory contracts, the general rule applies very strictly. In case of a contract in the alternative, if the parts are mutually exclusive specific performance of a part can be enforced.¹ A contract to sell two plots of land at a lump sum stipulating that he, the vendor had to make a marketable title and in case of failure to do so, he had to refund the purchaser's deposit; there were no provisions in the contract as to the relative values of the two plots and there was no condition providing for the amount of compensation payable generally in the event of breach of the contract. The vendor eventually became unable to make a title to one of the plots. The High Court of Calcutta held that the case fell within S. 16 and allowed specific performance of the part of the contract as regards the plot to which

¹ *Dalley v. Pullen* 3 Swi. 215.

| ² *Green v. Law* 22 Beav. 625.

a marketable title could be given and directed an inquiry as regards the abatement of the price. On appeal to the Privy Council it was held that in the absence of adequate provisions in the contract as to the nature and relative values of the two plots, and the amount of compensation payable generally in the event of breach of the contract by either party there was no material enabling the Court to pronounce that there was within the meaning of S. 16 of the Specific Relief Act "a part of a contract which taken by itself could and ought to be specifically performed" or "stood on a separate and independent footing from the other part of it," and that, consequently, the court could not act on a mere surmise that if opportunity ¹ were given for further inquiry, such material might be forthcoming and possibly might be found to be sufficient, nor could it make for the parties nor enforce upon them a contract which, in substance, they had not already made for themselves. In such circumstances specific performance of the contract could not be decreed.¹

This principle has been followed in below mentioned calcutta case where it is laid down "as a rule all agreements must be considered in entirety. Generally speaking the consideration for the each and whole part of agreement by one party is performance of the whole of it by another; if the court is not in a position to compel plaintiff, who comes for specific performance, to perform whole part of it, court will not compel defendant to perform his part².

17. Bar in other cases of specific performance of part of Contract—The court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections.

¹ Graham v. Krishna 27 Bom. L. R. 740=53 Cal. 335.

² Hajra v. Goculchand A. I. R. 1938 Cal 234=175 I. C. 315; Abdulhaziz v. Abdulsamad A. I. R. 1937 Mad 596=171 I. C. 30.

NOTES.

Object of the Section—The object of the section, says *Collett* is to prevent that remodelling of contracts which has been sometimes carried to excess in English cases. S. 17 lays down the general principle that it is of the essence of specific performance that part only of an agreement ought not to be performed,¹ except under special circumstances mentioned in sections 14, 15 and 16. They embody the exceptions to the general rule and contain all the provisions as regards the specific performance of part of a contract. This section says that if specific performance of a part of a contract is to be had at all the case must fall within these sections. As observed by their Lordships of the Privy Council in *Graham v. Krishna*² “sections 14 to 17 inclusive of the Specific Relief Act, 1877, are both positive and negative in their form. Taken together they constitute a complete code, within the terms of which relief of the character in question must be brought, if it is to be granted at all. Although assistance may be derived from a consideration of cases upon this branch of English jurisprudence, the language of the sections must ultimately prevail.”

Specific performance of part of contract—The defendants obtained from the plaintiff in 1921 a lease of a plot of land measuring over 4 acres for a term of 99 years. The lease contained a covenant that the “lease shall and may be renewed for a further term of 99 years upon such terms and conditions as shall be judged reasonable.” In 1914, the defendants transferred their right in 3.34 acres of land to a club which surrendered their interest to the plaintiff on the efflux of the term. The defendants having claimed renewal of the lease for 1.10 acres of land, in their possession, it was held, negating the claim, that the covenant for renewal referred to the whole plot and was not operative for a part of the premises.³

1 Per Pontifex, J., in *Cutts v. Brown* 6 Cal. 323.

2 *Graham v. Krishna* 27 Bom. L. R. 70

3 *The Secretary of State for India v. Volkart Brothers* (1928) 30 Bom. L. R. 1578, 50 Mad. 595 (P. C.).

18. *Purchaser's rights against vendor with imperfect title.*—Where a person contracts to sell or let certain property, having only an imperfect title thereto, the purchaser or lessee (except as otherwise provided by this chapter) has the following rights:—

(a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest;

(b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence;

(c) where the vendor professes to sell unencumbered property but the property is mortgaged for an amount not exceeding the purchase money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee;

(d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and cost, on the interest of the vendor or lessor in the property agreed to be sold or let.

NOTES.

Scope of the Section—This section extends to this country the principle of English Law which allows subsequently acquired interest to feed the estoppel¹. This section is limited to cases in which the buyer or lessee sues the seller or lessor and the latter is at the time of the suit able to make a perfect title though at the time of the contract he had only an imperfect title, or even none at all. The equitable principle of this section does not apply to government sales². This section applies not only to express agreements but implied ones also³.

Property—This term is general and so the relief given by S. 18 is not limited to immoveable property though it more usually applies to such.

Except as otherwise provided—The effect of this exception is to make applicable to the "case mentioned in the section all the provisions of this Act which either preclude or qualify the specific performance of contracts generally."

Difference between S. 15 and S. 18—Under S. 15 the defect is incurable whereas under S. 18 the defect is curable one in the manner specified; the purchaser can compel the vendor to cure the defect and complete the contract; the three clauses (a), (b) and (c) are the illustrations—the different circumstances, under which the vendor is enabled to perfect his imperfect title.

Clause (a)—This clause is based on *Sugden's Vendor and Purchaser* 297. "If a man sells an estate to which he has no title and after the conveyance acquire the title, he will be compelled to convey it to the purchaser." It is an undeniable proposition that when a party enters into a contract without the power of performing that contract and subsequently acquires the power of performing that contract, he is bound to do so.⁴ The relief in S. 18 can be claimed not only against the vendor but also against party claiming under him (S. 27).

1 Dalichand v. Bhabhukant 3 W. R. (P. C.) 734.

2 *Nanakchand v. Ghanduram* A. I. R. 1938 Lah. 360=177 I. C. 746.

3 A. I. R. 1930 P. C. 287=68 M. L. J. 233=128 I. C. 652

4 *Carve v. Mitchell* 19 Jur. 909.

This clause contemplates a particular means of obtaining the power to perfect the imperfect title *viz.*, "subsequent acquisition of any interest in the property."¹

In *Viraya v. Hanumanth* the principle of English Law was for the first time applied to cases in India. A was a member of an undivided family consisting of A, B his adoptive son and C his uncle; A without any family necessity sold certain land to D; B died. A made a gift of his property to his daughter-in-law E; D can compel A to make good of the lands sold to him. Where A contracted to sell an estate to B absolutely but at the time had only a contingent remainder in fee and the contingency then happened, A was called upon to convey the fee to B.

It may be noted that this principle of "feeding the grant by estoppel" has no application where the contract of assignment refers to property which has been expressly rendered inalienable by legislature.² S. 6 of the Transfer of Property Act says "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred." Under the same section transfer of a mere *spes successionis* is a nullity. This clause (a) will not again apply where the contract to sell is not a personal one. Where a mother sold certain property as that of a minor son and not as of her own, and she afterwards became the owner of property by succession, on death of her son, it was held that this section did not apply.⁴

Clause (b)—This clause applies only if the other person are bound to convey at the vendor's request; *i. e.*, that vendor must have a legal right to sue for its performance.

1 *Magniram v. Bakubai* 14 Bom. L. R. 508.

2 *Viraya v. Hanumanth* 14 Mad. 459; *Magniram v. Bakubai* 36 Bom. 510.

3 *Tinakhari v. Khedant* 25 C. W. N. 49; 32 C. L. J. 479.

4 *Rashmoni v. Surja* 32 Calcutta page 832=9 C. W. N 1019.

This limitation which is equitable is not to be found in English Law; in India if that other person is not bound to do the act in question, there can be no specific performance; the purchaser would be left his ordinary remedy by damages against the seller who could not pass a complete title.

Clause (c)—This Clause assumes that the vendor has represented the property to be unencumbered; but if there is no such representation the maxim of *caveat emptor* applies; the purchaser would suffer if he neglects to have the seller's title investigated. It is not necessary that the vendor must have made an express representation; the relief is awarded to the purchaser either if there is a false statement by the seller or there is silence on the part of the seller which is equivalent to speech, when contract is *uberimae fidei* (when he is bound to disclose). The relief under this clause is awarded when the transaction between the parties is still incomplete if it is once complete the remedy of the purchaser would be for damages, for breach of the contract and not under this section. For the operation of this clause of the section there must be:—(i) a contract of sale. (ii) the vendor must have the right to redeem the mortgage, (iii) the amount of the encumbrance should not exceed the purchase money. The purchaser of a mortgage decree free of encumbrances has a right to compel his vendor to pay off encumbrance upon the decree and make over the decree to him free of such encumbrances.¹

In a suit for specific performance of an agreement to execute a mortgage with prayer for mortgage decree, a decree for specific performance can be passed. It is not proper for the court to pass mortgage decree in the case.²

Clause (d)—As we have seen the above three clauses deal with a case where a purchaser or lessee is the plaintiff; but if a suit for specific performance is brought by the vendor

1 Khetri Das v. Agannala 9 C. W. N. 174.

2 Rogga rvarappam v. Satyanarayan A. I. R. 1946 Mad. page 56.

and it fails because of his not being able to perfect the title, the vendee has an additional relief given to him by this clause. The court does not simply dismiss the suit with costs, but proceeds to award to the defendant purchaser the special relief, *viz.*, a decree for return of his deposit with interest and his costs, and a lien for these all on the property agreed to be sold or let. The lien is of course limited to such interest as it may turn out that the plaintiff has in the property, Section 18 does not deprive the buyer of his ordinary Common Law remedy of suing for damages.

Return of deposit—No invariable rule can be laid down in regard to the purchaser's right to return of deposit. Such a deposit is paid as a guarantee for the performance of the contract and where the contract goes off by the default of the purchaser, the vendor is entitled to retain the deposit.¹ Where the plaintiff agreed to purchase 500 bales of cotton from the defendants and to deposit Rs. 5 per bale as earnest money, and actually deposited more than half of the earnest money and thereafter repudiated the contract, it was held that the plaintiff was not entitled to recover the deposit.² A purchaser who has paid part of the purchase money by way of deposit but who afterwards unjustifiably repudiates the contract of purchase or is guilty of any default by reason of which the sale is not carried out is not entitled to recover the deposit from the vendor.³ The mere rejection of the purchaser's claim for specific performance does not, by itself, deprive him of the equitable relief of insisting on a refund of the deposit paid by him as earnest money unless it can also be shown that there was a repudiation of the contract.⁴ Where there is a clause in the contract providing for the forfeiture of deposit in the event of the contract

1 *Colins v. Stimson* 11 Q. B. D. 142 ; *Ibrahim v. Fletcher* 21 Bom. 827.

2 *Roshan Lal v. The Delhi Cloth and General Mills Co. Ltd.*, 33 All 166;
Bishan Chand v. Redha Kishan Das 19. All. 489.

3 *Balvanta v. Bira* 23 Bom. 56.

4 21 Bom. 160.

not being performed, the parties would be bound by the terms of the contract. Thus where the contract provided that the deposit was to be forfeited if there was any delay on the part of the purchaser, it was held that the purchaser was not entitled to a return of deposit.¹ If vendor sues for specific performance but specific performance is refused on the ground that he could not give title free from reasonable doubt, he is entitled to return of his deposit. Reported cases are cited below.² In *Howe v. Smith*³ the purchaser did not pay the balance of his purchase-money on the day stipulated, and he had been guilty of such delay and neglect in completing the purchase that he had lost all right to the specific performance of the contract in equity, and it was held that the purchaser having failed to perform the contract within a reasonable time, had no right to a return of deposit.

The dismissal of a purchaser's suit for specific performance is no bar to a separate suit for a return of the deposit, but it is advisable that the right to specific performance of a contract or in the alternative to a return of the earnest money should be determined in one and the same suit and the plaintiff failing to obtain a decree for specific performance should not be driven to a separate suit to recover back his deposit.⁴ If time is not essence of contract, and purchaser offers to complete, within reasonable time, vendor is not entitled to forfeit his deposit even if contract provides that on default of completion of fixed date deposit is to be forfeited.⁵

19. Power to award compensation in certain cases—Any person suing for the specific performance of a contract may also ask for compensation

¹ *Natesa Aiyar v. Appavu Padayachi* 38 Mad. 178.

² *Haji Mohamed Mitha v. Musaji Is'ji* 15 Bom. 657, 669; *Low & Co. v. Jyotiprasad* 59 Cal. 699; A. I. R. 1940 Madras 739 *Seetharanamma v. Pattaradi*.

³ 27 Ch D. 89.

⁴ *Ibrahim v. Fletcher* 21 Bom. 852.

⁵ *Jamsed v. Burjorji* 40 Bom. 289.

for its breach, either in addition to or in substitution for such performance.

If in any such suit the court decides that specific performance ought not to be granted but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach it shall award him compensation accordingly.

If in any such suit the court decides that specific performance ought to be granted but that it is not sufficient to satisfy the justice of the case and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the court may direct.

Explanation—The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

ILLUSTRATIONS.

Of the second Paragraph—A contracts to sell a hundred maunds of rice to B; B brings a suit to compel A to perform the contract or to pay compensation. The court is of opinion that A has made a valid contract and has broken it, without excuse, to the injury of B but that specific performance is not the proper remedy. It shall award to B such compensation as it deems just.

Of the third paragraph—A contracts with B to sell him a house for Rs. 1,000. The price to be paid and the possession given on the 1st January 1877. A fails to perform his part of the contract, and B brings his suit for specific

performance and compensation which is decided in his favour on 1st. January 1878. The decree may, besides ordering specific performance, award to B compensation for any loss which he has sustained by A's refusal.

Of the explanation—A, a purchaser, sues B, his vendor for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires, the court may award A compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may under this section, award A compensation for the non-performance.

NOTE.

Scope.—This section is confined only to parties to a suit for specific performance. S. 4 of the Act must be read along with this. " Nothing in this Act except when it is expressly enacted to the contrary shall deprive any person of any right to relief other than specific performance which he may have under any contract." The aggrieved party can sue for either remedy open to him; he can ask merely for specific performance or damages or for both; he comes under this section if he asks for specific performance, and then it must be noted that the bar of S. 29 applies, viz., that if suit for specific performance is dismissed, no fresh suit for damages can be brought thereafter in respect of that contract.

In a suit to enforce a contract to place the plaintiff in possession of land and declare his right thereto the plaintiff may claim as an alternative for compensation against the defendant for his breach of the contract any premium paid

to him by the plaintiff'. In this case it was held that suit to have a mokurari patta enforced as against one co-sharer granting it and the other co-sharers who repudiate it and in the alternative to have the salami paid for the mokurari patta returned is in substance a suit to enforce a contract to place the plaintiff in possession of the land, and to declare his rights to it.

A lessor who was entitled to be put in possession and who could not obtain possession was allowed to sue either for specific performance or to get back his money.²

Rule of English Equity.—Formerly in England a suit for specific performance was not entertained at all except where the remedy at law by damages was inadequate, and if the suit was dismissed it was without prejudice to the other rights of the plaintiff. At last by Lord Cairns' Act the Court of Equity was enabled to award damages in lieu of, or in addition to specific performance ; so now both in India and in England a plaintiff can, says *Fry*, come into the court and say, "give me specific performance and with it give me damages or in substitution for it give me damages, or if I am not entitled to specific performance, give me damages by reason of the breach of the agreement."

Damages in lieu of specific performance—This can be given in lieu of specific performance only where specific performance could have been given ; it is only in case where the relief of specific performance should have been feasible and proper, but there are other circumstances which induce a court to substitute damages in its place.³ The first paragraph as we have already seen, applies to cases where a plaintiff has elected to proceed by way of a suit for specific performance.

Damages in the alternative—Although the plaintiff might not ask in his plaint in so many words for compensation, yet if it be clear from the circumstances of the case that the plaintiff has in effect asked for compensation also in the alternative, it is competent to the court to give him a decree for money by way of compensation.⁴

1 *Rajdbur v. Kali Krishna* 8 Cal. 963.

2 *Minidut v. Campbell* 12 W. R. 749.

3 *Lavery v. Purcell* 39 Ch. D. 519.

4 *Sheo Neraaj* (1881) A. W. N. 22; *Krishna Aiyar v. Shamana* 23 M. L. J. 617.

The Court may award damages, though no damages are asked for in the plaint.¹

No damages where the plaintiff abandons his claim—The court's power to give damages either additional or as an alternative to specific performance does not extend to a case in which the plaintiff has debarred himself from claiming specific performance. Thus when the plaintiff abandons his claim for specific performance, the court has no power to award damage without a sufficient amendment of the plaint. The purchaser filed a suit on January 10, 1920, for the specific performance of a contract for the sale of immoveable property situated on Malabar Hill with claims for damages additional or alternative in terms of S. 19. It was contended by the defendant that there never had been any concluded contract for the sale of the property or if there had been any contract it had been entered into on behalf of the defendant by an agent without any authority. On March 19, 1924, nine months or more before the trial, the plaintiff's solicitors notified the defendant that the plaintiff had decided to abandon his claim for specific performance and that he would claim damages against the defendant for breach of contract to the extent of Rs. 7 lacs. Before the trial, the plaintiff did not make any application to amend his plaint, but on an objection being taken at the trial that the plaintiff could not maintain his new claim for damages the learned trial judge permitted the plaintiff to amend his plaint so as to convert the suit into one for damages for breach of contract only. The trial court awarded damages to the plaintiff. The Appellate Court held that there was no contract binding on the defendant and reversed the decree. His lordship Macleod C. J. further remarked that even if there was concluded contract, the learned trial judge has not correctly interpreted the law regarding damages claimed in the alternative in a suit for specific performance of an agreement for the sale of immovable property. He clearly expressed that under section

¹ *Callianji v. Narsi* 19 Bom. 764; 1 Bom. L. R. 459.

19 of specific relief act the prayer for compensation in substitution for specific performance is a subsidiary and not an alternative claim. It is for the court to decide whether specific performance can be granted, and if not, what compensation could be awarded. The measure of compensation is entirely in the discretion of the court ; in awarding compensation, the court is not bound to follow the ordinary rules with regard to damages for breach of contract. When a person sues for specific performance and in the alternative for damages, the alternative claim is only good in the event of court holding that it is not a case for specific performance. The Privy Council held that there was no concluded contract binding on the defendant and as the plaintiff by his letter, in effect, intimated that he was no longer willing or ready to perform the contract on his part, the plaintiff had not only thereby renounced, but as from that moment had disentitled himself to a decree for specific performance and that under S. 19 no power was left in the trial Court to award in the suit any damages.¹

Penalty clause—A stipulation for penalty for the non-performance of a contract to sell *per se* does not avoid a suit for specific performance.²

Ought not to be granted—The second paragraph read with the illustration indicates that it applies to all cases where the specific performance cannot be had for any reason though the suit be expressly framed for the purpose ; the words “*ought not*” should be read as including “*cannot*” : hence all cases covered by S. 22 would come under this para.³

In awarding damages the court of equity applies the measure of damages appropriate to the particular kind of contract sued upon.

1. *Ardeshir Mama v. Flora Sasson* (1928) 30 Bom. L. R. 1242=52 Bom. 597; *Goculchandra v. Hajimahmed* (1938) 1 Cal. 563=A. I. R. 1938 Cal. 135; *Rama krishnaya v. Sree Ramula* A. I. R. 1939 Mad. 547.

2. *Nakam Chand* 8 P. R. 15.

3. *Wilson v. N. B. Ry. Co.* L. R. 8. Ch. D. 297 ; *Bowen v. Hyland* 8 Ch. D. 588.

Damages and specific performance—The paragraph¹ differs from S. 14, in this that under S. 14, specific performance of a part is decreed with compensation in money for the deficiency ; under S. 19 the court orders specific performance of the whole contract and orders damages for the breach of any incidental stipulation or for loss caused by the misconduct of the defendant. It should be noted that this paragraph relates to specific performance with compensation, a Court of Equity does not award specific performance with indemnity, for that would be doing inequity, leaving the door open to future litigation ; specific performance with the compensation brings the matter to a final settlement.²

Compensation—Measure of Damages—In awarding damages the court of equity applies the measure of damages appropriate to the particular kind of contract sued upon. In a recent Bombay case³ it was held that in a suit for specific performance of a contract for sale of immoveable property or in the alternative for damages, the measure of damages, if there is a breach and specific performance is not decreed, is not necessarily the same as in a suit for damages for breach of contract.—The court is to fix the amount of compensation by directing an enquiry or taking an account itself issuing a commission for the purpose instead of itself assessing it. The damages are of course assessed at the trial. Parties are not put to the expense of two trials for the same question.

Prospective Damages—Prospective damages are only awarded when the court may reasonably anticipate that plaintiff would suffer damage in future in consequence of defendant's acts or omissions.⁴

Explanation—This shows that in a suit for specific

1 *Wilson v. N. B. Ry. Co.* L. R. 8. Ch. D. 279; *Bowen v. Hyland* 8 Ch. D. 588.

2 *Jacques v. Millar* 6 Ch. D. 153.

3 *Flora Sasson v. Mama* 28 Bom. L. R. 126.

4 *Ramchandra Lalbhai v. Chinnbhai Lalbhai* 45 Bom. L. R. 1075.

performance, the mere fact that it has become impossible does not preclude a decree for damages. The case contemplated by the "explanation" is different from that under S. 56. Indian Contract Act ; under that section the impossibility is not one arising from any default of the party, whereas under this section it is the result of the default of one party. The object is to prevent a defendant from escaping scotfree by showing in defence his own default, as that he has since sold the property to another for value without notice or that he never had any title to it.¹

A suit for specific performance and damages was brought, but before it could be heard, the defendants performed the contract, and it was held that the plaintiff was nevertheless justified in bringing his suit to a hearing for the damages².

Where a plaintiff files a suit claiming specific performance of a contract and in the alternative damages, it is open to him to choose at the hearing which of the reliefs he will pursue if he is not otherwise in default.³

20 Liquidation of damages not a bar to specific performance—A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

ILLUSTRATION.

A contracts to grant B an underlease held by A under C and that he will apply to C for a license necessary to the validity of the underlease, and that if the license is not procured, A will pay B Rs. 10,000; A refuses to apply for

¹ Bouman v. Hyland 8 Ch. D. 588.

² Corb v. Thames Ironworks Co. L. R. 3 Q. O. 18.

³ Karsandas Kalidaas v. Chhotalal Mothichand 48 Bom. 259=77 I. C. 275=A. I. R. 1924 Bom. 119.

the license and offers to pay B Rs. 10,000; B is nevertheless entitled to have the contract specifically enforced if C consents to give the License.

NOTES

Liquidated Damages and Penalty.—In England at common Law distinction is made between a penalty and liquidated damages. A Penalty is a sum named by way of securing the performance of the contract and the whole amount mentioned is not always recoverable ; whereas liquidated damages consist of a sum named to be paid as damages for the breach of the contract. In India, this distinction is done away with by S. 74 Indian Contract Act, for a person is allowed to recover from the party liable for the breach of the contract a sum proportionate to the damages caused and not exceeding the sum specified in the contract. Even in English equity, this distinction is held to be immaterial for the fact that the sum named in the amount agreed to be paid as liquidated damages is equally with a penalty strictly so called, ineffectual, to prevent the court from enforcing the contract in *specie*. The modern general rule of equity is that if a thing is agreed to be done, the very thing ought to be done, though there is a penalty annexed to secure its performance or a sum is named in the contract as the amount to be paid in case of its breach. This is the rule embodied in S. 20 of this Act.

The contract must be otherwise proper to be specifically enforced—It must not be one where compensation of money would be adequate relief. It is essentially a question of constriction for the Court depending upon the circumstances of each case and the primary intention of the parties ; when there is a contract containing a clause for the payment of money in the event of non-performance, the court has to determine whether it is (a) a contract stipulating that one certain act shall be done with a sum annexed to secure the performance of this very act, or (b)

it is a contract stipulating that one of two things shall be done at the election of the party who has to perform it, *e. g.*, either performance or payment in money. To this latter class contracts termed alternative contracts, this section does not apply, for it would be substantially performed by the payment of money ; the former class is covered by this section which enables a court to decree specific performance in spite of the damages clause and thus carry out the intention of the parties. We have read in explanation to section 12 of this act that unless and until the contrary is proved, the court shall presume that breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money. Therefore where there is a contract to sell immoveable property a party should not be allowed to evade specific performance, even though a penalty is provided in the case of breach and the party in default is willing to pay.

A decree made in the terms of compromise of a suit restrained the respondents from selling any manganese ore from their mines to third parties until they had delivered to the appellants the quantity sold to them by the contract sued on, and provided that the respondents should deliver to the appellants 4000 tons a year at Rs. 8 per ton until the whole contract quantity was delivered ; clause 10 provided that if the respondents failed so to deliver, or violated any condition of the compromise they should pay to the appellants Re. 1 per ton on the whole of the ore still undelivered, and that the same should be recovered by execution of the decree. The respondents having failed to deliver in the first year the quantity provided the appellants applied to execute the decree by the seizure of ore of the appellants and the appointment of a receiver. After the date of decree the price of the Manganese ore had arisen to about Rs. 25 per ton.

Held that the respondents could not discharge the decree by paying Re. 1 per ton on the undelivered ore (as had been held by both courts in India) since clause 10 did not provide

that the payment of that amount should be a full and exclusive satisfaction of all obligations under the contract, and to hold that that was the effect of the decree would be to enable the respondents to render nugatory the injunction whenever the price of ore made it profitable to them to do so.¹ See also the undermentioned case ²

Injunction—The principle of S. 20 applies to positive as well as negative covenants in a contract, *i. e.*, to injunctions. This means that if injunction is necessary, the court will grant it, in spite of the fact that a penalty is provided in the contract for its nonperformance.³

(b) Contracts which cannot be specifically enforced.

21. *Contracts not specifically enforceable*—The following contracts cannot be specifically enforced.

(a) A contract for the non-performance of which compensation in money is an adequate relief ;

(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such that the court cannot enforce specific performance of its material terms ;

(c) a contract the terms of which the court cannot find with reasonable certainty ;

(d) a contract which is in its nature revocable;

1 Bissessar Das Daga v. Vas (1928) 53 Cal 238 (P. C.).

2 Kanhayalal v. Devdas 12 Lahora 328=131 I. C. 289=A. I. R. 1931 Lahore 657.

3 Madrasa Ry. Co. Rust 14 Mad. 18.

(e) a contract made by trustees either in excess of their powers, or in breach of their trust ;

(f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers ;

(g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than 3 years from its date ;

(h) a contract of which a material part of the subject matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

And save as provided by (The Arbitration Act 1940 ¹ no contract for refer (present or future differences)² to arbitrations shall be specifically enforced; but if any person who has made a such contract (other than an arbitration agreement to which the provisions of the said act apply)³ and has refused to perform it sues in respect of subject which he has contracted to refer, the existence of such contract shall bar the suit.

ILLUSTRATIONS.

OF CLAUSE (a). (1) A contracts to sell, and B contracts to buy a lakh of Rupees in the four per cent. loan of the [Central Government]⁴

¹ Substituted for " Code of Civil Procedure and The Indian Arbitration Act " 1899 by Sec. 49 (2) of Arbitration Act 1940 (Act x of 1940) which consolidated with amendments the previous Law.

² These words were substituted for the words " A controversy by the Indian Arbitration Act, 1899 (IX of 1899), Sec. 21, and remain part of this section of Specific Relief Act although S. 21 of Indian Arbitration Act, 1899 was repealed by Repealing act 1938 (Act of 1938)

³ These words were added by Arbitration Act 1940,

⁴ Substituted for " Government of India " by A. O. 1937.

(2) A contracts to sell and B contracts to buy 40 chests of indigo at Rs. 1,000 per chest.

(3) In consideration of certain property having been transferred by A to B, B contracts to open a credit in A's favour to the extent of Rs. 10,000 and to honour A's drafts to that amount.

The above contracts cannot be specifically enforced for in the first and second both A and B and in the third A would be reimbursed by compensation in money.

OF CLAUSE (b). (1) A contracts to render personal service to B.

(2) A contracts to employ B on personal service.

(3) A, an author, contracts with B, a publisher, to complete a literary work.

B cannot enforce specific performance of these contracts.

(4) A contracts to buy B's business at the amount of a valuation to be made by two valuers, one to be named by A and the other by B. A and B each name a valuer but before the valuation is made, A instructs his valuer not to proceed.

(5) By a charter-party entered into in Calcutta between A, the owner of a ship, and B, the charterer, it is agreed that the ship shall proceed to Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London.

(6) A lets land to B and B contracts to cultivate it in a particular manner for three years next after the date of the lease.

(7) A and B contract that, in consideration of annual

advances to be made by A, B will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A when cut and ready for delivery.

(8) A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B he will paint a picture for B.

(9) A contracts with B to execute certain works which the court cannot superintend.

(10) A contracts to supply B with all the goods of a certain class which B may require.

(11) A contracts with B to take from B a lease of a certain house for a specified term at a specified rent, "if the drawing room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach.

(12) A contracts to marry B.

The above contracts cannot be specifically enforced.

OF CLAUSE (c). A the owner of a refreshment room contracts with B to give him accommodation there for a sale of his goods and furnish him with the necessary appliances. A refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

OF CLAUSE (d). A and B contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for if it were so performed, either A or B might at once dissolve the partnership.

OF CLAUSE (e). (1) A is a trustee of land with power to lease it for 7 years. He enters into a contract with B to grant a lease of the land for 7 years, with a covenant to renew the lease at the expiry of the term. This contract can not be specifically enforced.

(2) The directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders. They contract to sell it without any such sanction. This contract cannot be specifically enforced.

(3) Two trustees A and B empowered to sell trust property worth a lakh of Rupees, contract to sell it to C for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C cannot enforce its specific performance.

(4) The promoters of a company for working mines contract that the company when formed shall purchase certain mineral property: They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase money. This contract cannot be specifically enforced.

OF CLAUSE (f). A company existing for the sole purpose of making and working a Railway, contract for the purchase of a piece of land for the purpose of erecting a cotton mill thereon. This contract cannot be specifically enforced.

OF CLAUSE (g). A contracts to let for 21 years to B the right to use such part of a certain Railway made by A as was upon B's Land, and that B should have a right of running carriages over the whole line on certain terms, and might require A to supply the necessary engine power, and that A should during the term keep the whole Railway in good repair; specific performance of this contract must be refused to B.

OF CLAUSE (h). A contracts to pay an annuity to B for the lives of C and D. It turns out that, at the date of the contract, C, though supposed by A and B to be alive, was dead. The contract cannot be specifically performed.

NOTES

CRITICISM:—This section has come in for a severe cri-

ticism at the hands of Pollock & Mulla. The learned commentators observe as follows:—

“It is rather unfortunate that this section and the illustrations do not more clearly distinguish cases where there is a contract binding in law and enforceable, only not by specific performance, from those where there is no contract at all. Cases under subsections (a), (b) and (g) belong to the former class; Cases under subsections (c), (d), mostly but-as illustration show—not wholly to the latter; cases under (e) and (f) may belong to either, according as the promisor has or has not made himself personally liable besides purporting to bind beneficiaries, or a principal, whom he had no authority to bind; (h) was probably intended to apply only to cases of common mistake, or the failure of fundamental condition, going to the root of the contract, but its terms are wide enough to cover a partial failure of consideration. But perhaps the use of the word ‘Contract’ in the enacting part was meant to exclude all cases of wholly void agreements, though it is hard to see how ‘a contract the terms of which the court cannot find with reasonable certainty’, can escape being an agreement void for uncertainty under S. 29. of the Contract Act.

“In clause (d) the word ‘Revocable’ is inaccurate; it should rather have been ‘determinable.’ There is no such thing as a revocable contract of any kind. But for the illustration one would have thought the draftsman had in mind such cases as *Moorehouse v Colvin*.¹ Where the alleged promise amounts only to an expression of intention to do or give what the promiser himself thinks proper.

“The fixed limit of time laid down by clause (g) does not correspond to any rule or presumption in English Law. It should be needless to remark that an agreement which is to be performed within three years, or one, or once for all and immediately, may, nevertheless on one of the other

¹ (1881) 1 Beav. 341-92 R. R- 452,

grounds enumerated, be such as the court will not order to be specifically performed.

Clause (e) is in truth a particular case under a more general principle which is not explicitly asserted in the Act, but of which the justice and necessity are obvious. The Court cannot order a performance that would be a punishable offence, or contravene any statute or public regulation made by lawful authority or be wrongful against any third person."

Where pecuniary compensation is adequate relief—Clause (c) of S. 12, (of which clause (a) is the reverse), and the explanation to that section should be read with this clause (a) of S. 21. It is an invariable rule of Equity to refuse specific performance in all cases where the contract is satisfied by a mere payment of money. Illustration 1 to this clause is based on the leading Equity case of *Cuddee v. Rutter*,¹ Illustration 3 is based on *Larios v. Bonany*.²

Where a contract was to leave certain property by will entered into by a mere donee of a testamentary power of appointment, specific performance was refused, the proper remedy being a suit for damages against the donee's personal representatives³

An agreement to make or take a loan of money cannot be specifically enforced whether the loan be on security or not⁴, See illus. 3.s

Where a plaintiff mortgagee alleged that the defendant mortgagor executed a mortgage in favour of the plaintiff on consideration of money due, and that the defendant having

¹ *Cuddee v. Rutter* 1 W. & T. 848.

² L. R. 5 P. C. 346.

³ *Hill v. Schwaz* L. R. 1892, 3 Ch. 10.

⁴ *Sichel v. Mosenthal* 8 Jur. N. S. 275; *Meenakshi Sundar v. Ratnasawmi* 41 Mad. 959; *Sheikh Galim v. Sadarjan Bibi* 43 Cal. 59

⁵ *Western Wagon v. Vest* 1892, Ch. 271; *Anakaran v. Saidamadith* Mad. 79.

delivered the deed to the plaintiff and having promised to get it registered, subsequently took it back to get it registered but refused to do so and the plaintiff sued to have a fresh hypothecation bond executed by the defendant and to have the deed so executed duly registered, the suit was held barred under this clause inasmuch as pecuniary compensation would be adequate relief¹

“ADEQUATE RELIEF” – In this section the word “Adequate” means adequate in the mind of the court for some reason found as a fact and stated by the court inspite of the plaintiff’s opinion that it is inadequate. In a case where specific performance of a lease of a particular shop was asked for by the plaintiffs, claiming in the final alternative a sum to recoup their loss as estimated by them as damages, in case specific performance was refused, it was held that they were entitled to a decree for specific performance.²

✓ **Hire-Purchase agreement:**—Certain articles were sold by A to B in pursuance of a hire-purchase agreement between them under which the articles were to remain property of A until the payment of all instalments of the purchase price. B was entitled to return the articles in good working order at any time, provided that all amounts due under the instalments were paid. In default of payment of any instalment A was entitled to take possession of the articles and also to recover the amount due under the instalments and cost of putting them in order. The parties fell out subsequently and B instead of returning the articles himself under the terms of agreement, requested by letter to take back the article. A instead of ignoring this letter as not bring a proper compliance with the terms of the agreement, asked for time to take back the articles and after getting them examined, refused to take them back as they were not found in good working order. A sued B for the amount of

¹ Mayaram v. Pragdatt 5 All. 44

² Brijballabhdas and others v Mahavirprasad and others A. I. R. 1924 All. page:529=78, I. C. 167.

the instalments due upto the date of the suit and for declaration that B was liable to pay all the instalments as per agreement;—

Held, that the suit was one for specific performance of a contract for the sale of goods and as the failure of B to perform his obligation under the hire-purchase agreement for the sale of goods could be adequately compensated, the contract would not be specifically performed.¹

Contract running into minute or numerous details—Illustrations 5, 6, 7, 9 and 11 are instances of such contract. These are all based on decided English cases. Contracts relating to building and repairs come under this clause if the work is such that the court cannot superintend: the clause is indefinite and strikes no boundry line. It follows thus that everything depends upon the circumstances of the particular case. English cases show that a court of Equity would decree specific performance if the work to be done is definite and the plaintiff is not in a position to do it himself and damages afford no sufficient compensation for non-performance. But the tendency recently is against decreeing specific performance because for the most part the contract is so uncertain that the court cannot enforce its own judgment.²

This clause has to be resorted to in cases of contracts by Railway Companies to make and maintain works for the convenience of the lands of neighbours; these are enforced if the above conditions are satisfied. It must be noted that there is no warrant for suggesting that this clause applies only when specific performance of its material terms is impossible. It may be that at a great cost of time and money the court may be in a position to enforce specific performance of a particular contract: but in such cases it does not, for it is not desirable on the ground of public policy. The Legislature

¹ Abdul Raheman Nizami v Manikram 195 I. C. 860=A. I. R 1941 Rangoon 177.

² Mosely v. Virgin 3 Ves. 184; Gabbit v. Smith 10 Jur. N. S 1123.

therefore does not lay down any specific rule ; it asks the court to determine for itself whether it would be practicable to enforce it or not.

Contract depending on personal qualifications—

Illustrations 1, 2, 3 and 8 are instances of contracts depending on personal qualifications of parties and illustrations 4, 10 and 12 are instances of those that depend on the volition of the parties. Contracts of hiring and service,¹ come under the first of this clause : The court refuses to exercise its jurisdiction, for the relationship in such contacts is *entirely* of a personal and confidential character, and that would not be in the interest of society to compel persons to *continue* personal relations with one another when they are not themselves desirous of maintaining the same ; besides there would be no hope even if it is enforced—of ultimate and real success. In these cases the ground of refusal is apparent. The court cannot substitute anything in place of the volition of the parties themselves, the main element being wanting. there is no contract that the court can enforce ; under this would come contracts to appoint valuer, to marry, &c.

A contract to employ a shipping broker will not be specifically enforced ; nor one to employ an auctioneer.²

The nature of the contract preventing specific performance—These last words in cl. (b) indicate that the clause is wide and that the inability of the court to enforce specific performance is not limited to the two special grounds discussed above ; but that it would refuse to exercise its jurisdiction whenever the contract from its nature is such that the court cannot enforce specific performance of

1 Ram Charan Bajpai v. Rakhal Das Mukerjee 41 Cal 19, 33=20 L. C. 157. Ram Kumar v. Sholapur Spg. & Wvg. Company A. I. R. 1934 Bom. 427—36 Bom. L. R. 907,

2 Chinock v. Sainsbury 30 L. J. ch. 409. Thiruthiyil Unnikruthi v. Narayan Ghattayar A. I. R. 1929 Mad. 777; Valia Kayani v. Krishnan 55 Mad. 519.

its material terms. There is no boundary line. The court is left to determine it for itself according to the facts of the case ; it would not enforce it if it is practically impossible. If a trustee who has entered into a contract to sell, die prior to decree in a suit for specific performance brought against him, it is open to his son to raise question as to his non-liability to perform his father's obligations.¹

Contract for the sale of the good-will of a business alone was not enforced.²

Mutuality—We shall first see what is doctrine of mutuality is and then see whether this doctrine is applicable in India or not.

English Law.—"A contract to be specifically enforced by the Court must as a general rule, be mutual,—that is to say such that it might at the time it was entered into, have been enforced by either of the parties against the other of them."—Fry. S. P.

In other words the contract must be mutually binding on the parties. The leading English case on the subject is *Flight v. Bolland*, 4 Russ. 298.

Collett however in this Law of Specific Relief in India says "But from the history of this Act we learn that this doctrine (due only to the servance of equitable and legal remedies in England) was purposely eliminated....."

Mr. Whitely Stokes also is of opinion that the Specific Relief Act does not introduce the doctrine of mutuality that prevails in England:

The decisions of the Indian Courts on the subject are not very illuminating. Then comes the Privy Council decision

1 S. Thiruvankatachariar 26 M. L. J., 218.

2 Boxter v. Conoley 1 J. & W. 576.

of their Lordships in *Mir Sarwarjan v. Fakhruddin*,¹ where it was observed "They are, however, of opinion that it is not within the competence of a guardian of a minor to bind a minor or a minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract." It may be observed that in virtue of the opinion expressed by their Lordships it cannot be said that the doctrine of mutuality is not applicable in this country. But it was held that where a minor attained majority and the other party had not repudiated the contract which had been made by a minor's guardian, contract was specifically enforced.²

Uncertainty of terms—Suit for specific performance differs from that from mere damages in this that whereas in the latter it is enough to prove a breach, in the former it must be shown not only that the contract is not performed but also what is the contract which is to be performed, *i e.*, its terms must be reasonably certain ; certainty must be a reasonable one having regard to the subject-matter and the circumstances under which it was entered into. The want of certainty may be (i) either in the agreement not completely indicating some of the essentials of a contract as to subject-matter, parties, prices or terms; or (ii) in the description of one or more of these being too vague to be definitely apprehended. But then the tendency of a court of equity is not all at once to accept the defence of "uncertainty." It generally supplies the details if possible when the terms are general, or if they are with the help of oral evidence capable of being made certain, or if they are not too vague.

1 3 Cal. 232 (P. C.)=39 I. A. 1; *Venkatachalan v. Sethuram* 56 Mad. 433.

2 *Adinarayana v. Venkatasubhaya* A. I. R. 1940 Mad. 625=1940 Mad. 852.

3 *South W. Ry. Co. v. Wythes* 5 De. G. M. & G. 888.

Where the Ry. Company had agreed with a land owner to erect a station on certain grounds which they had bought from him, but the agreement contained no description of the station nor any stipulation as to the use of it, it was not specifically enforced.¹ So also where the contract was to purchase "the land required" for making a Railway at so much an area and the quantity was however not stated.² So also where the contract was to perform at a theatre, but no details were given.³

The court declined to decree specific performance in a suit brought by the Zamindar to obtain an order upon the Government to re-excavate and clear the water passage of a particular *Khal*.⁴

Where the circumstances are such that the value of the land must be always treated to a great extent a matter of guess and speculation and the court has no means of ascertaining by the ordinary method what a fair valuation would be the court will take the usual means of ascertaining it and decree specific performance.⁵

If the essential terms of the contract are settled, it may be specifically enforced, either as consisting of those terms or together with such other terms and conditions as are usual in the contracts of that description.⁶

A contract revocable in its nature--A court of equity does not interfere in such cases for its interference would be idle in as much as what it would do, might at the next moment be undone by the opponent. This clause would

1 *Wilson v. N. & B. J. Ry. Co.* L. R. 9 Ch. 279.

2 *Lord James v. L. & N. W. Ry. Co.* 15 Beav. 203.

3 *Kemble v. Kear* 6 Smi. 333.

4 *Chandra Sikkur v. Col. of Midnapur* 3 Cal. 464.

5 *New Birbhun Coal Co. v. Belaram* 5 Cal. 932.

6 *Gopal Sridhar v. Shasi bishun* 60 Cal. 111=A. I. R. 1933 Cal. 109.

apply to all cases where there is a stipulation, making an agreement revocable on the happening of a certain event and it has happened so that the other side can at will revoke the contract.

Where the agreement was to grant a lease with conditions as to its being revocable on certain defaults and the defendant was in a position to revoke it, specific performance was refused.¹

A contract by a trustee in breach of his trust—

It is a general rule that there can be no specific performance which would necessitate a breach of trust or compel a person to do what he was not lawfully competent to do. The words "trust and trustee" are defined in S. 3; and a breach of trust is a breach of duty imposed on the trustee as such by the law relating to trusts, public or private. This clause refers both to contracts in breach of their trust or beyond their powers. (Cls. 3 and 4 Indian Trusts Act.)

Where an agreement was made by a guardian of a minor to sell land belonging to that minor at a fixed price, but contingent upon the permission of the court, it was not enforced in the absence of such permission.²

Difference between a Corporation and a Public Company—Cl. (f) relates both to a corporation and a public company, but these differ from each other; it is open to the members of an unincorporated public company to depart from an agreement entered into by each with the others, but the members of a corporation or a body incorporated by charter or statute cannot do so.

Contract by Corporation ultra vires—A contract by a corporation or company in the proper form is *prima facie* good and the burden is on him who alleges it to be void to show that it is in excess of its powers. The fact of its being *ultra vires* may be proved by the express provisions

¹ Gourly v. Somerest 1 V. & B. 68.

² Narain v. Akhoy Narain 12 Cal. 152.

of law creating the company or by necessary inference therefrom ; contracts that go to defeat the objects of the corporation are prohibited by implication, and so are contracts foreign to the purposes of the incorporation ; the funds of the company can go only to the purposes for which it exists; the fact that the foreign object is profitable is immaterial. But then though a contract cannot be entered into for a purpose not authorized by the incorporation, the corporation can effectuate the authorized purpose by unauthorized means, by their common consent. In cases of this kind the court has to carefully consider the statute creating the corporation or its Memorandum of Association. This clause refers to contracts *ultra vires* by the corporation or public company or promoters—which cannot subsequently be made good:—It does not refer to contracts within the powers of that body but which are beyond the authority of its officer or agent ; such contracts can be ratified by it if done on its behalf and after it came into existence.

Contracts by Promoters—Contracts made by promoters of a company before the company came into existence cannot be specifically enforced against the company, nor can they be ratified by it. A contract by a promoter would be valid and enforceable if it was such as could be binding on it if made after its formation and if it is sanctioned by the Act creating the company.¹ In England formerly a contract by promoters of a company was held enforceable if it was for something warranted by the terms of the incorporation and if the company recognized it as binding on itself ; but now that principle is doubted and the law as laid down by *Kindersley v. C.* in *Earl of Shrewsbury's* case is as above.

A contract involving the performance of a continuous duty—This clause (g) is based on the same reasons as clause (b) is:—*viz*, the court cannot superintend

¹ *Imperial Ice Mg. Co. v. Manchershaw* 13 Bom. 415; *Earl of Shrewsbury v. N. S. Ry. Co.* L. R. 1 Eq. 593.

the performance, in England a court of equity does not enforce specific performance wherever performance of a continuous duty extending over many years is involved. In India the rule is qualified and a limitation of 3 years is introduced ; in connection with this rule it must be noted that if the contract involves the period of 3 years : it fails as to whole ; there can be no splitting of the period : further, if it be for a period not exceeding 3 years, there would be no specific performance if the rule in clause (b) applies. This doctrine does not apply to negative covenants¹.

On the basis of this clause courts have discounted agencies alleged to be perpetual or undeterminable.²

The subject-matter having ceased to exist—This clause (h) should be read along with S. 20, Indian Contract Act, which says that “ where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement it is void.” This clause refers only to a particular class of such mistakes ; of course the mistake must be mutual : but the mistake in this clause is limited to the fact of the existence of the subject-matter as the *material part* of it and not necessarily the whole at the *date* of the contract : In such cases the party injuriously affected has two remedies—one under this clause to defend a suit for specific performance—and the other under S. 35 of this Act to avoid the contract :

Contract to refer to arbitration—(a) *The rule of Equity.* Such contracts are not enforced specifically because as said by Story “ it is against public policy to exclude from the appropriate judicial tribunals of the state any persons who in the ordinary course of things have a right to sue there.” Where the stipulation is an effort to divest the ordinary jurisdiction of the common tribunals of justice, courts

1 Madras Ry. Co. v. Rust 14 Mad. 18.

2 Rhodes v. Forwood L. R. 2 P. 256 ; Cowasjee v. Lalbhai 31 A. 200.

of equity will not, any more than courts of law, interfere to enforce that agreement, but they will leave the parties to their own good pleasure in regard to such agreements. The regular administration of justice might be greatly impeded or interfered with by such stipulation if they were specifically enforced. And at all events, Courts of justice are presumed to be better capable of administering and enforcing the real rights of parties—than any mere private arbitrators, as well from their superior knowledge—as their superior means of sifting the controversy to the very bottom.¹ The rule laid down in last para to S. 21 is a sound one for it prevents indiscriminate ousting of the ordinary administration of justice by means of private agreements, and it bars one party from inequitably disavowing his own contract.

(b) *Nature of the contract*—The contract, the existence of which would bar a suit under the circumstances contemplated by this section, must be an operative contract and not one broken up by the conduct of all parties to it,² there is no bar if there is no subsisting agreement capable of being carried into effect, *e. g.*, two out of three arbitrators refused to act and there being no provision for the appointment of others.³ Where the parties were contentious amongst themselves with reference to the arbitration proceedings and some of the arbitrators had died and no award was made, it was held that the contract to refer was no bar.⁴ Again there must be subsisting agreement to refer to arbitration; if the submission is revoked there is no bar to the suit.⁵

(c) *Provision made by the Arbitration Act 1940*—Section 31 to 36 of the Arbitration Act may be read to understand the provisions thoroughly. Sect. 31 deals with jurisdiction of the court. Sect. 32 lays down that no suit shall lie on any

1 *Shelt v. Corporation of Liverpool* 27 L. J. Ch. 230.

2 *Tahal v. Bisheshur* 8 All. 57.

3 *Jatumbi* (1912) M. W. N. 957=4 M. L. J. 15=12 M. I. T. 346.

4 *Tahal v. Bisheshur* 8 All 57.

5 *Dentch v. Briscole* 40 Q. B. D. 117.

ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award. Sect. 33 provides that the only procedure for setting aside an awarded is by way of motion on affidavits. No suit is permitted whereby the agreement for reference is challenged. Sect. 32 and 33 are meant to provide for simple, speedy and cheap settlement of differences of arbitration Agreement. Sect. 34 deals with the power of court to stay legal proceedings where there is an arbitration agreement. Sect. 35 deals with effect of legal proceedings on arbitration. Sect. 36 gives the court in certain circumstances the power to rescind the arbitration agreement whether or not it contains a clause making the award a condition precedent to the right of action. The Arbitration Act has not taken away the rights of the parties to obtain an injunction

(d) *Point in dispute*—The question whether any particular matter in dispute is within the agreement to refer, is one which must be decided by the court and not left to the arbitrator.¹

(e) *Scope of the clause*—The wording of this clause is very wide : it covers contracts to refer any matter which can be legally referred to arbitration, *i. e.*, even a suit pending in a court.² This section applies to an agreement before suit as well as to one made during pendency of suit.³ Once having entered into a contract to refer to arbitration which contract is carried into effect, it is not competent to the contracting party to maintain a suit in respect of any subject which he contracted to refer.⁴ In that case parties had applied for an adjournment on the ground that they had agreed to refer the matters in dispute to arbitration : suit was accordingly adjourned and the matter referred and award made ; the suit was held barred.

(f) *Origin of the rule*—The last paragraph of this clause

1 *Piery v. Young* 44 Ch. D. 200.

2 *Sheomber v. Devdat* 9 All. 153.

3 *Sheo Dutt v. Sheo Sankar* 27 All. 53.

4 *Saligram v. Thima Kuwar* 4 All. 546.

is based on the English Statute—S. 11 of the Common Law Procedure Act, 17 & 18 Vict., C. 125. This statute indirectly has the effect of compelling the plaintiff specifically to perform the contract to refer to arbitration.

(g) *Refusal*—The defendant must expressly set up a defence that the plaintiff refused to perform his part of the contract ; the refusal to arbitrate must be before the action is brought.¹ It is for the defendant to prove the fact of refusal before he can rely on S. 21 as a bar to the suit : Then again the question is what would amount to refusal. It has been held by the Calcutta and Allahabad High Courts that the mere filing of a suit is not such a refusal² ; but then an application for leave to withdraw from the arbitration is evidence of refusal.

Where an agreement to refer to arbitration has not been acted upon and which has become from lapse of time unenforceable, it cannot be set up as a bar to a suit respecting matters included in the agreement.³

A contracted to sell goods to B. the contract containing the following clause "that any dispute arising hereafter, shall be settled by the selling broker whose decision shall be final." A brought a suit against B for damages for breach of contract B pleaded that the dispute should have been referred to the broker, and that therefore the suit was barred under S. 21, Specific Relief Act. It was held that since no refusal on A's part was proved, the section did not apply.⁴

A one of the parties to a contract to refer a controversy to arbitration, brought a suit against B. for a part of the subject-matter referred to ; B did not allege in answer that

¹ Crisp v. Adlard 23 Cal. 956.

² Kumud Chunder v. Chundra Kant 5 Cal. 498; Tahal v. Bisheshur 8 All. 57.

³ Rai Kumar Singh v. Jagmohan Singh 33 All. 315.

⁴ Kumud Chunder v. Chundra Kant 5 Cal. 498.

A had refused to perform the contract. It was held that the mere fact of A's filing the suit was not equivalent to his refusal to perform the contract.¹

The parties to the suit agreed to refer the matters in dispute to arbitration and order was passed under Sch. 2, cl. 3, C. P. Code ; before the time fixed for making the award one of the parties made an *ex parte* application under O. 23, r. 1 of the C. P. Code for leave to withdraw with liberty to bring a fresh suit. It was held that the court had no power to revoke an order of reference made prior to the award except under Sch. 2, cl. 5, C. P. Code and so the suit was barred.²

If the agreement to refer did not indicate what was the matter to be referred or if the plaintiff's claim had not been laid before the arbitrators, such an agreement would not bar the plaintiff's suit ; nor if the plaintiff had withdrawn from the arbitration and there was no evidence to show the time at which she had withdrawn therefrom.³

Where parties to suit refer matters in difference between them in such a suit to arbitration, the further hearing of the suit will be barred under section 23 (2) of Arbitration Act 1940.⁴

Of the discretion of the Court.

22. *Discretion as to decreeing specific performance*.—The jurisdiction, to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so ; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial

1 Tahal v. Bisheshwar 8 All. 57.

2 Sheombar v. Devdat 9 All. 168.

3 Adhibai v. Cursonadas 11 Bom 199.

4 Mahamad Yashia v. Bibi Soghra A. I. R. 1937 Patna 232.

principles and capable of correction by a court of appeal

The following are cases in which the court may properly exercise a discretion not to decree specific performance:—

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there be no fraud or misrepresentation on the plaintiff's part.

ILLUSTRATIONS.

(a) A, a tenant for life of certain property, assigns his interest therein to B. C contracts to buy, and B contracts to sell, that interest. Before the contract is completed, A receives a mortal injury, from the effects of which he dies the day after the contract is executed. If B and C were equally ignorant or equally aware of the fact, B is entitled to specific performance of the contract. If B knew the fact, and C did not, specific performance of the contract should be refused to B.

(b) A contracts to sell to B the interest of C in certain stock in trade. It is stipulated that the sale shall stand good even though it should turn out that C's interest is worth nothing. In fact the value of C's interest depends on the result of certain partnership accounts on which he is heavily in debts to his partners. This indebtedness is known to A, but not to B. Specific performance of the contract should be refused to A.

(c) A contracts to sell and B contracts to buy certain land. To protect the land from floods it is necessary for its owner to maintain an expensive embankment. B does not know of this circumstance, and A conceals it from him; specific performance of the contract should be refused to A.

(d) A's property is put up to auction. B requests C, A's attorney, to bid for him ; C does this inadvertently and in good faith. The persons present seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to B at a low price. Specific performance of the contract should be refused to B.

II. When the performance of the contract would involve some *hardship* on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

ILLUSTRATIONS

(e) A is entitled to some land under his father's will on condition that, if he sells it within 25 years, half the purchase money shall go to B. A forgetting the condition contracts before the expiration of the twenty-five years to sell the land to C. Here the enforcement of the contract would operate so harshly on A that the court will not compel its specific performance in favour of C.

(E) *Additional Illustration*:—A sells a leasehold to B, and in answer to B's inquiry states in good faith, but by inadvertence, that no notice from the landlord has been served on the property. In fact notice has been served requiring certain dilapidations to be made good. This being a matter within A's knowledge, affecting the value of property, the failure to disclose is material and A is not entitled to the specific performance, even though in circumstances B may not be entitled to rescind the contract.

(f) A and B, trustees join their beneficiary C in a contract to sell the trust estate to D, and personally agrees to exonerate the estate from heavy encumbrances to which it is subject. The purchase money is not nearly enough to discharge those incumbrances, though at the date of the contract the vendors believed it to be sufficient ; specific performance of the contract should be refused to D.

(g) A, the owner of an estate, contracts to sell it to B, and stipulates that he A, shall not be obliged to define its boundary. The estate really comprises a valuable property not known to either to be a part of it ; specific performance of the contract should be refused to B, unless he waives his claim to the unknown property.

(h) A contracts with B to sell him certain land, and to make a road to it from a certain railway station. It is found afterwards that A cannot make the road without exposing himself to litigation ; specific performance of the part of the contract relating to the road should be refused to B, even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

(i) A, lessee of mines, contracts with B, his lessor that at any time during the continuance of the lease, B may give notice of his desire to take the machinery and plant used in and about the mines; and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease ; such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

(j) A contracts to buy land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

(k) A contracts with B to buy from B's manufactory and not elsewhere all the goods of a certain class used by A in his trade. The court cannot compel B to supply the goods ; but if he does not supply them, A may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

The following is a case in which the court may properly exercise a discretion to decree specific performance:—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

ILLUSTRATION.

A sells land to a Railway company, who contract to execute certain work for his convenience. The company take the land and use it for their railway. Specific performance of the contract should be decreed in favour of A.

NOTES.

Jurisdiction is discretionary—Although decreeing specific performance is within the discretion of the court, it does not follow that the court can arbitrarily or capriciously enforce one contract and refuse to enforce another. The discretion is said to be judicial and the court is to have regard to the contract of the plaintiff and to circumstances outside the contract itself. As *Story* puts it: "In truth the whole exercise of this whole branch of equity jurisprudence is not a matter of right in either party but is a matter of discretion in the court—not indeed of arbitrary and capricious discretion dependent upon the mere pleasure of the judge but of that sound and reasonable discretion which governs itself as far as it may, by general rules and principles ; but at the same time, which withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties."

Court not bound to grant relief—Cases falling under this section are those in which it would be lawful under any of above sections 12–21 to grant specific performance, but in which from special circumstances it is not expedient to do so. As observed in *Duke of Bedford's Case*¹ courts of Equity do not interfere to decree specific performance,

1 *Duke of Bedford's case* 2 My. & K. 352;

except in cases where it would be strictly equitable to make such a decree : else the parties are left to their remedy at common law. According to *Story*, it is impossible to limit the principles or the exceptions which the complicated transactions of the parties, and the ever changing habits of society may at different times and under different circumstances require the court to recognise or consider. Under this section a defence often set up is that of laches of the plaintiff ; it is a ground on which the courts often in the exercise of their discretion refuse to give relief to the plaintiff. It is needless to refer to *Dicta* of many an eminent judge on the point: for said Lord *Cranworth* : " specific performance is a relief which a court of equity will not give unless in cases where the parties seeking it come promptly and as soon as nature of the case will permit," but then it is not possible to define the amount of delay requisite to disentitle the plaintiff to the aid of the court. As ruled by *Miller, J.*² Each case must depend upon its own circumstances." There may be circumstances under which a court may think it right to dismiss a suit brought nearly 3 years after the contract was entered into and there may also be circumstances which may justify a court in awarding a decree even when the suit is brought after such delay.

There may be cases which cannot be brought within the four corners of any of the provisions of the Contract Act as to the invalidity of agreements but in which nevertheless a court of equity may properly refuse to exercise its jurisdiction under this Act.³ The circumstances mentioned in the section are illustrative and not exhaustive.⁴

A contract which though not illegal, but detrimental to the public welfare is not to be enforced in equity ; thus a.

1 Eods v. Williams 4 Der. M. & G. 691.

2 Mukundlal v. Chhotatal 10 Cal. 103.

3 Gobind Chandra 18 C. W. N. 180.

4 Rajakumar 14 C. L. J. 627 ; Karsandas v. Chhotatal 48 Bom. 275

contract for sale of land in lieu of hushing up of departmental inquiry against a public servant was not enforced.¹

A party cannot call upon a court of equity for specific performance unless he has shown himself ready, desirous, prompt and eager.²

Where specific performance is sought against a subsequent purchaser who has a right of pre-emption, relief of specific performance would be rendered nugatory under the circumstances of the case.³

Delay, Laches and Acquiescence—We have seen that granting of specific performance is a matter of discretion with the Court, delay of a party is often a defence in cases of specific performance. Para 13 of the statement of objects and reasons says : "The right to enforce a contract specifically may, in England, be lost by delay in resorting to the court and a large number of cases exist relating to this doctrine. The bill contains no rules on the subject, for in India the Provisions of the Limitation Act, Art. 113, that suits for specific performance must be brought within 3 years from the day on which the plaintiff has notice that performance is refused, renders the doctrine of laches inapplicable to this class of litigation."

There are judgments which go to show that laches is no defence at all in cases where a statutory period of limitation is prescribed ; but such judgments must be read with great care because we have seen that in order to get specific performance a party must show himself to be ready, desirous, prompt and eager ; we have also seen that specific performance is not a matter of right in the party but is a matter of discretion in the court. Hence the court in the exercise of the equitable

1 Govind Chandra 18 C. W. N. 369.

2 "The section is not exhaustive, but illustrative," Peer Mahomed 29 Bom. 234.

3. Rajkishore Kuer v. Muhamad Quaiyum. A. I. R. 1942 Pat. 366; Habibar Rahman V. Ali Azahar. 44 Cal. L. J. 162.

powers conferred under this section may refuse specific performance in a proper case, though the statutory limit of three years may not have expired; but it may also be stated that courts will interfere in very rare cases on the ground of mere laches of the plaintiff.

Delay must be such as to raise an inference of abandonment of right.¹ Mere laches on the part of a person in bringing a suit for specific performance is not in itself a defence in law. Mere delay does not amount to waiver of abandonment, apart from other circumstances or conduct of the plaintiff indicating that the delay was due to a waiver or abandonment on the part of the plaintiff.² In the case of *Peer Mahomed*³ it was observed that laches to bear the plaintiff's right must amount to waiver, abandonment, or acquiescence, and to raise the presumption of any of these, the evidence of conduct must be plain and unambiguous. Where delay does not amount to waiver or abandonment or acquiescence and has in no way altered the position of the defendants, it does not disentitle the plaintiff to the relief by way of specific performance.⁴ Mere delay will not defeat the plaintiff's suit, unless it has prejudiced the defendant in some way. The defence of delay, if not taken in the courts below, should not be allowed to prevail in second appeal.⁵

This has been followed in a recent Madras case where it is observed that mere delay by itself is no ground for refusing relief by way of specific performance. But where it raises presumption of the abandonment of plaintiff's claim, or has caused hardship to opposite party or some thing to his prejudice Courts are entitled to exercise their discretion and refuse plaintiff's relief as prayed.⁶

1 *Kisen Gopal* 33 Cal. 633.

2 *Suryaprakasarajudu* 20 M. L. J. 581.

3 *Peer Mahomed* 29 Bom. 234.

4 *Jangal Singh v. Gulam Mahomed* 3 Lah. 376.

5 *Mokund Lall v. Chutay Lall* 10 Cal. 1061

6 71 Mad. L. J. Page 599=169 I. C. 12=A. I. R. 1937 Mad. 124, *Rami Reddi v. Pattabhirami Redi.*

Plaintiff should have no unfair advantage over the defendant—On this point the reader is referred to paras. 385, 406 of Fry's Specific Performance. There need not be any fraud or misrepresentation by the plaintiff; it is enough if there is inequality or unfairness due to any cause whatever; the court refuses relief of specific performance if there are signs of distress in the party against whom it is sought; it is very cautious in such cases. The unfairness complained of may be in the terms of the contract itself or it may be in other surrounding extrinsic circumstances (age, duress, mental weakness etc). The unfairness need not be intentional; but then this paragraph refers only to unfairness at the time the contract is entered into: unfairness is not to be judged by subsequent events: It has been held, that at the time of making the agreement both parties had equal means of knowledge, the fact that their relative positions are subsequently discovered to be different from that supposed at the time does not affect the question. A court will not refuse specific performance in the absence of fraud or misrepresentation where the contract though onerous is not unconscionable¹; where the court finds that the parties were not really on equal terms, it would dismiss the suit for specific performance.

The principles stated above have been reiterated in a recent Bombay High Court Ruling³ where their Lordships observed "Under Section 22 of Specific Relief Act, Court is not bound to decree specific performance of an agreement because it is lawful to do so. It can take into consideration circumstances attending its execution and can refuse to order specific performance in its discretion. The facts of the case are;—Defendant No. 2 sued defendant No. 1 for Rs. 5000/—and applied for execution of property belonging to him. No attachment was levied as the defendant No. 1 gave an undertaking by a pursis that he would not alienate property till decision

1 Shiblal v. Coil Baerilly 16 All 423.

2 Davis v. Maung Shwe Go 33 L. A. 155; Calianji v. Narsi 19 Bom 764-769.

3 Jethalal Nanshah Modi v. Bechar 47 Bom. L. R. 460.

of suit. There was decree against him in favour of defendant No. 2. In appeal, decree was confirmed by High Court. 4 or 5 days afterwards defendant No. 1 agreed to sell his property to plaintiff who was his relative and who had advanced him monies to meet costs of litigation. But before completion of sale, defendant No. 2 executed the decree, attached the property of defendant No. 1 had a prohibitory order issued against him under Order 21 Rule 54 of C. P. Code. Plaintiff having sued for specific performance, it was held that under discretion given to Court under Sec. 22, Specific performance of contract of sale should be refused to plaintiff as it would be injurious to decree holder. There are cases in which though there is nothing that actually amounts to fraud or misrepresentation, there is nevertheless a want of equality and fairness in contract, which might induce the Court to refuse specific performance.¹

In *Cook v. Clayworth*² specific performance was refused on the ground of intoxication of the person against whom it was sought.

In *Thomas v. Dering*³ it was refused on the ground that it would be injurious to third parties In *Johnson v. Legarel*⁴ it was refused on the ground that the plaintiff was himself a previous voluntary settler of the property in question. "If however the contract has been entered into by a competent party, and unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and therefore of right, as are damages. The mere hardship of the result will not effect the discretion of the court." Fry S. 46 See also S. 142, (Thus where an old man of 75 executed a Baina patra in the presence of his son, two of his officers and his own lawyer, disinterested third persons being also

1 Shaikh Ahmed. v. Lalluram 13 W. R. 426; Karsandas v. Chhottalal 25 Bom. L. R. 1144; ~~srar~~ Hussain v. Deonarayan 1929 A. 372.

2 Cook v. Clayworth 18 Ves. 12.

3 Thomas v. Dering 1 Ke. 729.

4 Johnson v. Legarel 1. & R. 281.

present, and no advantage was taken of his alleged weakness), but very good value was secured for his property, the Calcutta High Court decreed specific performance in favour of the purchaser.¹

Illustration to para 1.—illus. (a) is suggested by the facts of *Ellard v. Llandaff*.² There a lessee obtained renewal of a lease on the surrender of an old one knowing and suppressing the fact not known to the lessor, that the person on whose life the old lease depended was in dying state ; and specific performance was therefore refused. illus. (b) is taken from *Smith v. Harrison*³ ; that was however a case brought not only by the vendor for specific performance but by the purchaser also for setting aside the sale, and the latter was given the relief. illus. (c) is the case of *Shirely v. Stratton*.⁴ illus. (d) is the case of *Twining v. Morrice*.⁵ This illustration is a leading case, setting the rule as to puffing at auctions and the "surprise" of the defendant. It must be noted however that bidding by a puffer unknown to the vendor is no defence to specific performance, *Union Bank v. Munster*⁶ but in *Mortimer v. Bell*⁷ there was bidding by auctioneer and partner and the lot was at last knocked down to defendant ; and the suit for specific performance against him was dismissed.

There should be no greater hardship on the defendant—Sub-section 2 contemplates a case where the vendor has entered into a Contract without full knowledge of the circumstances.⁸ For a discussion of the doctrine of hardship, see Fry's Specific Performance at pages 417-430. A court of equity does not enforce specific performance

1 Ram Kumar Sunder v. Raj Kumar (1928) 55 Cal. 285 at 313.

2 Ellard v. Llandaff 1 B. & B. 241.

3 Smith v. Harrison 26 L. J. Ch. 412.

4 Shirely v. Stratton 1 Bro. C. C. 440.

5 Twining v. Morrice 2 Bro. C. C. 326.

6 Union Bank v. Munster 37 Ch. D. 51

7 Mortimer v. Bell L. R. 1 Ch. 10

8 Harashame 19 C. L. J. 420.

if the result thereof would be to cause greater hardship to defendant than its non-performance would to the plaintiff. The court does it though there be no improper conduct on the part of the plaintiff.¹ The "hardship" contemplated by this clause is not mere improvidence or inadequacy : it means that the transaction must be unconscionable, *i. e.*, there should be considerable hardship, such that its performance would be inequitable ; but then a court will not help a defendant if he has brought it about himself or merely because the object the defendant had in entering into the contract has become impossible.² Again the hardship should be such as the defendant could not foresee ; it is for the defendant to establish that the hardship was the result not flowing obviously from the terms of the contract but that it arose from something collateral—from something which was not present to the minds of the contracting parties at the time of the contract: But where the hardship has been brought about upon the defendant by himself, the court will not consider that as a circumstance in favour of the refusal of specific performance.³ The further element necessary to bring a case within this clause is that the plaintiff must be in a position to be put in *status quo*, *i. e.*, no hardship would be caused to him by refusal of specific performance. As in case of "unfairness," the court looks at "hardship" at the time the contract was entered into. It is enough if it is just and fair and not productive of hardship at its date ; if so the fact that it became less beneficial to one of them by force of subsequent events is immaterial except when plaintiff is to be blamed for the subsequent events.⁴ As we have seen the hardship must not be due to defendant's own act or mistake. But if defendant himself is responsible for hardship, Court will not take circumstance of hardship into consideration.

1 *Folk v. Gray* 4 Drew 660.

2 *Haawood v. Cove* 25 Beav. 40; *Peubroke v. Thorj* 3 Swause 433 ;
Haradhan v. Bhagabati 41 Cal. 863;

3 *Natadhaue* 19 C. L. J. 420.

4 *Duke of Bedford's case*.

On this point decide cases are¹ ; A court of equity will not listen to a person saying that another would have given him more money or better terms than he agreed to take.

All courts are reluctant to refuse specific performance on the ground of unilateral mistake unless the defendant proves something further in evidence showing that hardship amounting to injustice would be inflicted upon the defendant by holding him to his bargain.²

In *Adam v. Weaore*³ a man gave a high price for a piece of ground with a view to build on it a mill for which the leave of a third party was needed, and then he could not get the leave ; he was forced to take this ground for he brought the hardship by his own mistake.

In *Haywood v. Cope*⁴ the defendant agreed to take lease of 2 seams of coal ; it turned out that they were worthless and he would have to pay a large sum for nothing ; specific performance was decreed for defendant had examined the coal for himself and he was liable for the hardship brought upon him by himself.

Illustrations to para II.—Illustration (e) is the old case of *Faine v. Brown*⁵ ; and illustration (f) is the case of *Wedgwood v. Adams*.⁶ Illustration (g) is case of the *Baxendale v. Sealer* and (h) is the case of *Peacock v. Penson*⁸ illustrating that equity will not compel a person specifically to perform an act which would render him liable to a forfeiture—which he is not lawfully authorised to do ; illustration (i) is the case of *Talbot v. Ford*⁹ ; in that case the covenant was

1 41 Cal. 852. *Haradhu v. Bhaga Bati*; A. I. R. 1937 Mad. 154 *Nami Redeli v. Pattabhirami*; A. I. R. 1932 Cal. 493. *Jadunath v Chandra Bhusan*.

2 *Kunhsraj v. Ranchodas* 7. Bom. L. R. 319.

3 *Adam v. Weaore* 1 Bro. C. C. 567.

4 *Haywood v. Cope* 25 Beav. 40

5 2 Ves. 307.

6 6 Beav. 600,

7 19 Beav. 601.

8 11 Beav. 355.

9 *Talbot v. Ford* 18 Sim. 173.

held to be so injurious and oppressive to the lessee that not only was specific performance refused but also an injunction to prevent a breach of the contract was not granted ; illustration (j) is the case of *Denne v. Light*¹ where the specific relief was refused on the ground that it would be a hardship—inasmuch as it would be compelling a man to buy what he could not enjoy ; Illustration (k) is suggested by *Hills v. Croll*.²

Performance is allowed if plaintiff has performed his part—This para. (iii) is based on the general principle that when an agreement is performed in part, a court of equity has to do its best to carry out that agreement by a decree for specific performance : It is a necessary preliminary however that the contract should be capable of specific performance.* A court will not act under this clause unless it has jurisdiction in the original subject-matter of the contract. Besides there must be no uncertainty as to the agreement sought to be enforced ; and the part performance must be shown to have been done in accordance with the agreement, and with a view to perform the agreement.⁴ It must be noted that the question of performance is one of fact for the court to decide.

It has been held in recent Bom. case that where a contract is otherwise capable of specific performance and plaintiff has done substantial acts pursuant to the contract then the court would exercise its discretion in his favour. If the contract offends against S. 21, even if it is partly performed, court will not decree specific performance.⁵

Illustration to para III.—The Illustration is the case of *Storer v. G. W. Ry. Co.*⁶ This clause covers such Railway

1 26 L. J. Ch. 459

2 2 Ph. 60.

3 *Kirk v. Bromley Union* 2 Ch. 640.

4 *Humphrey v. Green* 10 Q. B. D. 154.

5 *Ramchandra Lalbhai v. Chinubhai Lalbhai*. 45 Bom. L. R. 1075.

6 *Storer v. G. W. Ry. Co.* 2 Y. & C. 48.

cases where the defendant Railway Company has taken possession of the land under the contract and the plaintiff has performed his part under the contract by parting with the land ; and he has himself no opportunity of doing the works which the Railway company has contracted to do ; specific performance is in such cases the only proper remedy for it is not possible to ascertain damages.

The defendant agreed in writing (unstamped) to sell two of his lands and a house to the plaintiff in consideration of an adjustment of accounts between the parties. In pursuance of the agreement, the defendant handed over to the plaintiff possession of the lands, and executed a stamped but-unregistered sale-deed of the house. On the plaintiff subsequently suing for specific performance, it was held that secondary evidence of unstamped agreement of sale was not admissible even on payment of penalty and it was therefore held that the agreement of sale having been confessed and in part carried into execution, the matter had advanced beyond the stage of contract and the equities which had arisen could not be administered, unless the contract was regarded. Specific performance was therefore decreed.¹

(d) For whom contracts may be specifically enforced.

23. *Who may obtain specific performance—*
Except as otherwise provided by this chapter, the specific performance of a contract may be obtained by—

(a) any party thereto ;

(b) the representative in interest, or the principal, of any party thereto ; provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract,

or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part there of has already been performed ;

(c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;

(d) where the contract has been entered into by a tenant for life in due exercise of power, the remainder-man ;

(e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor-in-title and the reversioner is entitled to the benefit of such covenant ;

(f) a reversioner in remainder, where the agreement is such a covenant, and reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ;

(g) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

(h) when the promoters of the public company have, before its incorporation, entered into a contract, for the purposes of the company, and such a contract is warranted by the terms of incorporation,—the Company.

NOTES

It may be noted that Chapter II dealing with the specific performance of contracts discusses in ss. 12 to 22 what contracts may or may not be specifically enforced. Ss. 23 to 28 deal with the question as to the party for and against whom contracts may be enforced.

Any party—Any party to a contract may sue for specific performance of the contract. A person who is not a party to a contract, *i. e.*, a stranger cannot enforce specific performance of it. When there is a joint contract, all parties must join in enforcing it. Under a contract to convey land to several purchasers, it is not open to some of the joint contractees to enforce specific performance of the contract, if the others refuse to join in the suit.¹

But in a recent Nagpur case, a different view has been taken, where it was held that if a co-contractor refuses to join as plaintiff, he should be made a defendant. Court will be concerned with presence of all parties before it.²

Representative in interest—A person is said to be a representative in interest of another if he is an assignee of the contract from the original obligee or is his legal representative after his death : of course these people can enforce specific performance if the contract is not a personal one or the assignment of the interest of the obligee is not prohibited by the contract.

A legal representative cannot claim specific performance where the personal quality of the deceased party with whom the contract was made, is a material element in the contract.³ Where a person sells his land or house to another person, and the vendee enters into a contract to convey the property

1 *Safur Rahman v. Maharunnessa* 24 Cal. 831; *Krishnamachari v. Gangadhar* 5 Mad. 29.

2 *Jagdeo Sige v. Bisambar* 171 I C 654=A. I. R. 1937 Nagpur. 186.

3 *Mahendra Nath* 30 Cal. 265.

back to the vendor ~~as to the vendor~~ or his heirs, the right to obtain a reconveyance ~~from~~ the vendor or his heirs is ordinarily assignable to a stranger who can enforce it by a suit. When however, the intention of the parties is that the vendor or his heirs alone have the right of repurchasing the property, the assignee cannot enforce the contract specifically.¹

In *Stevens v. Binning*² the contract was between an author and publisher to write a book.

In *Oherlity v. Headges*³ the contract was between a coach builder and a person to whom he had contracted to hire a carriage for five years.

In *Boxter v. Burfield*⁴ the contract was by a master to teach an apprentice.

In these cases specific performance was not granted to the personal representatives.

See Fry Ss. 211—232.

Personal quality meaning of—Personal quality need not necessarily be restricted to particular skill or learning but may include anything peculiar to a man or his descendants which would entitle them to especial favour at the hands of the other contracting parties. (*Per Beaman, J.*)⁵

An option to repurchase property is *prima facie* assignable, though it may be so worded as to show that it was personal to grantee.⁶

Undisclosed principal can enforce—Though the name of the principal is not mentioned in the contract, he is

1 *Harikinsondas v. Bnagwandas* (1934) 36 Bom. L. R. 290.

2 *Stevens v. Binning* 1 K. & J. 118.

3 *Oherlity v. Headges* 1 Sch. & Lab. 123.

4 *Boxter v. Burfield* 2 Str. 566.

5 *Vithoba Madhav v. Madhav Damodar* 42 Bom. p. 344.

6 *Vishwashwar v. Durgappa*. 42 Bom. L. R. 653.

allowed to enforce the contract. It must be noted that the question when an undisclosed principal is entitled to sue upon a contract originally made by another is one governed by the Indian Contract Act and is not peculiar to specific performance.

A mortgagor in possession made an agreement for a lease of 21 years to the defendant ; then the mortgagees asserted their paramount title and required the defendant to pay rent to them which he did. Defendant then by notice put an end to his tenancy. It was held that there was no privity between a mortgagor and a mortgagee as to leases made by the former after the mortgage ; consequently the mortgagees having asserted their paramount title, they could not enforce the agreement against the defendant who had become a tenant from year to year and was entitled by notice to put an end to the tenancy.¹

Proviso to cl. (b)—The first proviso to cl. (b) is taken from the judgment of *Parke, B.*,² who has held that executors are liable on all contracts of the testator which are broken in his life-time, and with the exception of contracts in which personal skill is required, on all such contracts broken after his death : such parties can sue on the contract though they be not named therein.

Persons beneficially entitled—Cl. (c) lays down an exception to the general rule prevailing in England at common Law and in equity, viz., that a stranger to a contract cannot enforce it even though he took benefit under it. That is also the common Law rule in India as enacted in S. 37, Indian Contract Act subject to the exception recognised by this clause ; but then the privilege is confined to particular contracts—a settlement on marriage or a compromise of doubtful rights between members of the same family. The contract must be executed and not executory. The reader is referred

¹ Corbett v. Plowden 25 Ch. D. 678.

² Siboni v. Kirkman 1 M. & W. 418.

to Law of trusts and leading case of *Ellison v. Ellison* for the rights of volunteers to enforce imperfect voluntary trusts. The ostensible reason why without being parties to the transaction, they are allowed to enforce the contract, is that they are within the valuable consideration of marriage and so competent to enforce stipulations in their favour. The question is whether the whole settlement is covered by the consideration of marriage. As to compromises of doubtful rights by members of the family, see *Stapilton v. Stapilton*.¹ Where the agreement executed by the defendant specifically charged immoveable property for the allowance which he bound himself to pay to the plaintiff, and where she was the only person beneficially entitled to it, it was held, that though no party to the document, she was entitled to proceed in equity to enforce her claim.²

When the senior members of the family compromised a dispute regarding rights of themselves and other members of their respective branches, it was held that compromise was a compromise of doubtful rights as contemplated by Sec. (23) (C), and so widowed daughter in law, not a party to compromise, was entitled to enforce terms of contract.

Remainderman—He is a person taking the remainder; and remainder is an ulterior estate limited to take effect and to be enjoyed after a prior estate is determined, both estates being created at the same time. It arises out of express grant *e. g.*, where A divides his lands to B for life and remainder to C for life with power to B to make leases. In this case C is a remainderman. This is different from a reversion; the latter is the residue left in the grantor which is to commence in possession after the determination of a particular estate (*e.g.*). A mortgages his estate to B, the equity of redemption, the right of A to get the property back is his reversion. The

1 *Stapilton v. Stapilton* 2 L. C. 836.

2 *Khwaja Muhemed Khan v. Husaini Bagum* 34 All. 413 (P. C.)

3 *Janki Bala Dabya v. Maheswar Das.* A. I. R. 1942 Pat. 460.

remainderman is allowed to enforce contracts made by a tenant for life in due execution of a power; this is because of powers given to a tenant for life to make a contract which as such he could not otherwise make and to have, as their motive the better management and enjoyment of the estate;—such is a power to lease for a term which may extend beyond his own life and a remainderman is within the scope of the benefit of the power and has an interest to enforce a contract made in the exercise of it, and the tenant-for-life in exercising it contracted as well as on behalf of those in remainder as of himself.¹

Reversioner in possession.—We have seen above the meaning of the term *reversion* in its strict sense; but as *Collett* says, this term is used in cls. (e) and (f) in a popular rather than its proper legal sense. Theoretically a reversioner and remainderman are perfectly distinct from each other; there can be a reversion expectant, or a remainder expectant, on the determination of the particular estate; but “a reversion in remainder” is strictly an inaccurate expression; the term remainder is perhaps used here in a lax sense in relation to some prior interest so far as regards the possession or beneficial interest. The term “reversioner” should therefore be construed to include as well a remainderman as also an assignee, for the real intent of these clauses is perhaps to permit any successor in title or estate to specifically enforce covenants made with his predecessor in titles or estate; thus the assignee of a lessor as also the assignee of a lessee can have the benefit of these clauses. The expression “reversioner in possession” is strictly speaking inaccurate for a reversioner on coming into the possession of his estate ceases to be a reversioner, but the meaning is clear; the clause refers to the reversioner who can after coming into possession enforce the covenant; at the time of the agreement he is merely a reversioner, but when he seeks to enforce, he has to be in posses-

1. *Rogers v. Humphreys* 4 A. & E. 299.

sion. If he is not in possession, *i. e.*, the reversion is only expectant, his case comes under cl. (f) and not cl. (e); he has then to show not only that he is entitled to the benefit of the covenant that runs with the Land but that he would sustain material injury by reason of its breach; ordinarily the proper person to enforce the covenant is the person in possession of the property to which the covenant relates.

The reversioner must have been entitled to the benefit of the covenant—It must be such as is known in English Law as a covenant running with the land; it must be directly relating to the land, so that not only the original parties or their representatives but each successive owner of the land may claim the benefit or be liable to its obligation. It is not necessary for the purpose of this clause here to go minutely to consider what covenants run with the land, and what are purely collateral or personal with the contracting parties only. The enforcement of covenants that run with the land is in practice more often effected by an injunction than by direct specific performance. The covenant in order to run with the land must touch and concern the land demised, *e. g.*, to cultivate the lands in a particular manner, not to carry on a particular trade, to do periodical repairs, to use the house as a dwelling house only.¹

The right of the amalgamated company—This cl. (g) is an illustration of a particular process of assignment a little different from that in cl. (b). By the process of amalgamation the rights under the contract of the existing companies is transferred to the new body arising out of their fusion. The new company is in the like position to that of any other assignee of a contract. The converse of this, *i. e.*, the liability of the amalgamated company is discussed under S. 27.

Rights under contracts made by promoters—Under this clause comes a plaintiff company seeking to enforce

1. Spencer's case 1 Sm. L. C. 68.

contract entered into by the promoters prior to its formation; but then the contract must be one within the scope of the purposes of the company. It must be noted however that this cl. (h) is not intended to apply to contracts to take shares but only to contracts for the working purposes of the company. The promoters are not the agents of the company before its formation, It cannot be ratified by the company after its incorporation for it was not in existence at the date of the contract ;

(e) For whom contracts cannot be specifically enforced.

24. *Personal bars to the relief*:—Specific performance of a contract cannot be enforced in favour of a person—

(a) who could not recover compensation for its breach ;

(b) who has become incapable of performing or violates, any essential terms of the contract that on his part remains to be performed ;

(c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract ; or

(d) who previously to the contract had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration, has been made and was then in force.

1 Imperial Ice Co. v. Manchester 13 Bom. 414; Lydney Iron Co. 33 Ch. D. 91.

ILLUSTRATIONS

To Clause (a)—A, in the character of agent for B enters into an agreement with C to buy C's house. A is in reality acting not as agent for B but on his own account. A cannot enforce specific performace of his contract.

To Clause (b)—A contracts to sell to B a house and to become a tenant thereof for a term of 14 years from the date of the sale at a specified yearly rent. A becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

A contracts to sell to B a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A without B's consent fells the trees. A cannot enforce specific performance of the contract.

A holding land under a contract with B for lease, commits waste, or treats the land in an unhusbandlike manner. A cannot enforce specific performance of the contract.

A contracts to let and B contracts to take an unfinished house, B contracting to finish the house and the lease to contain covenants on the part of A to keep the house in repair. B finishes the house in a very defective manner ; he cannot enforce the contract specifically though A and B may sue each other for compensation for breach of it.

To Clause (c)—A contracts to let, and B contracts to take a house for a specified term at a specified rent. B refuses to perform the contract. A thereupon sues for, and obtains compensation for the breach. A cannot obtain specific performace of the contract.

NOTES

General—It should be noted that S. 24 differs from the other sections in the Chapter inasmuch as the defence to specific performance discussed in the section is not

founded on anything in the contract itself ; it is not derived from the nature of the contract as in S. 21, but it is founded on the acts and conduct of the plaintiff. To illustrate this by reference to the 4 defences in S. 24, cl. (a) relates to a case where there is nothing in the contract to prevent compensation being recovered but there is some objection personal to the plaintiff ; under clause (b) it is not any part of the contract itself that has become incapable of performance but it is the plaintiff himself who is personally incapable of performing what is otherwise very possible of performance ; under cl. (c) it is the personal act of the plaintiff that he has already elected to avail himself of his alternative remedy ; under cl. (d) it is his being personally fixed with notice of the rights of third parties that renders his own claim to specific relief inequitable. (*Collett*).

Plaintiff's inability to recover compensation—

This clause really refers to a case where plaintiff ought not to recover compensation and not to a case where being entitled he does not recover it, *e. g.*, a case under S. 236, Indian Contract Act, which is embodied in the illustration.¹

Plaintiff's incapacity to perform his part of the contract—The part left unperformed must be a material one. The plaintiff may become incapable either because of legal disability (*e. g.*, bankruptcy or insolvency, conviction for felony or loss or destruction of the title deeds of the vendor :) or on account of his mental or physical condition (which would be material in contracts involving personal skill). Illustration is a case of incapacity due to insolvency of the plaintiff. Upon a contract for the sale of land, where the purchaser wrongly insisted on his right to compel the vendor to give an absolute warranty of title and withheld payment of the purchase-money beyond the time fixed, he was not entitled to specific performance as he had delayed performing his part

1. *Lord v. Stephens* 1 Y. C. C. 228.

of the agreement. The plaintiff brought a suit for specific performance of an agreement between him and the defendant whereby the latter contracted to purchase a mortgage-deed which was to be transferred to the defendant by an agreement in writing. The deed, however, before assignment, became barred by the law of limitation, and he refused to take it. It was held that the plaintiff was under an obligation to keep the deed alive and therefore no relief was granted to the plaintiff when he asked for specific performance of an agreement which he himself was unable to perform.²

The general rule in equity is that a party who asks the Court to enforce agreement in his favour must aver and prove that he has performed or has been ready and willing to perform, the agreement on his part.³

Violation of an essential term—This part of cl. (b) embodies the general principle which as *Fry* says, disentitles the plaintiff to any relief, viz., by acts which tend to the rescission of the contract or to the subversion of the relation established by it; contracts for leases afford apt illustrations to this clause; see illus. 2 and 3. It must be noted however that it is not every breach that bars the relief under S. 24; it must be a breach of an essential term; for this see Ss. 14 and 15. This clause applies equally to default in respect of acts which ought to have been already done as of acts to be done hereafter.

Settlement must have been in force—This means that the settlement must be executed and not executory; a settlement is said to be in force if it is a valid existing instrument, though the time for the enjoyment of the benefits may not yet have come; "it is immaterial whether the persons

1. *Bindeshri Prasad v. Mahant Jairamgir* 9 All. 705 (P. C.); *Haji Fakir Muhammad v. Shaik Abdulla* 12 Bom. 678.
2. *Jatindra Nath Basu v. Peyer Deye Dibi* 43 Cal. 990 (P. C.).
3. *Mama v. Sasson* 30 Bom. L. R. 1242; *Karsandas v. Chhotatal* 25 Bom. L. R. 1037.

claiming under it have present interest in possession or a future interest expectant upon the determination of some prior interest in the first taker. A settlement is said to be voluntary when it is not founded on any valuable consideration, which latter term includes money, marriage or some equivalent for money in the eye of the law. This clause (*d*) is co-relative to cl. (*c*) of S. 25. Under S. 24 the settlement is protected as against a subsequent purchaser for value with notice of the settlement whereas S. 25, cl. (*c*) as we shall see, protects it as against the settlor himself by refusing him specific performance of his subsequent contract for value with a third person.

25. Contract to sell property by one who has no title or who is a voluntary Settlor—A contract for the sale or letting of property whether moveable or immoveable, cannot be specifically enforced in favour of vendor or lessor —

a) who knowing himself not to have any title to the property, has contracted to sell or let the same ;

(b) who, though entered in the contract believing that he had a good title to the property cannot at the time fixed by the parties or by the court for the completion of the sale or letting give the purchaser or lessee a title free from reasonable doubt ;

(c) who, previous to entering into the contract has made a settlement (though not founded on any valuable consideration, of the subject-matter of the contract.

ILLUSTRATIONS.

(a) A, without C's authority, contracts to sell to B an estate which A knows to belong to C. A cannot enforce spe-

cific performance of this contract even though C is willing to confirm it.

(b) A bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B, B gives general prospective assent in writing to any sale which the trustees may make. The trustees then enter into a contract with C to sell him the land. C refuses to carry out the contract. The trustees cannot specifically enforce this contract as in the absence of B's consent to the particular sale to C, the title which they can give C, is, as the law stands, not free from reasonable doubt.

(c) A being in possession of certain land, contracts to sell it to Z; on inquiry it turns out that A claims the land as heir of B, who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A cannot compel Z specifically to perform the contract.

(d) A out of natural love and affection makes a settlement of certain property on his brothers and their issue and afterwards enters into a contract to sell the property to a stranger. A cannot enforce specific performance of this contract so as to override the settlement and thus prejudice the interests of the persons claiming under it.

NOTES.

Scope of the Section—This section differs from the previous section, *viz.*, 15, 18, 24 which apparently cover a similar class of cases. This section is supplementary to S. 18 inasmuch as, whereas S. 18 lays down what right a purchaser may actively enforce against a vendor or lessor with an imperfect title, this section gives us what defences the purchaser may maintain against a vendor or lessor with no title at all. If there is no title at all then only first clause of S. 25 applies; the defence under this section arises out of the personal default of the plaintiff and not out of the subject-matter of the

contract as in other sections : besides S. 18 applies to a case where there is imperfect title capable of being made perfect ; Ss. 14 and 25 contemplate a case where the perfection of title cannot be rectified.

Plaintiff having no title—it must be shown that the plaintiff knew that he had no title. The title which the vendor must show must be a title in himself or in those whom he has a legal or equitable right to require to join in the conveyance ; he has no right to say that some other person is willing to enter into a contract and to force the title of that other person on the purchaser.¹ Illustration (a) shows the kind of case contemplated by this clause. If he believed that he had a good title his case would fall under cl. (b).

Plaintiff's inability to give a title free from reasonable doubt.—This clause applies if a definite title cannot be passed at the time fixed for the completion of the sale or letting ; the fact that at the date of entering into the agreement he believed that he had a good title to the property is immaterial. This clause does not refer to titles that are clearly good or bad ; it speaks of cases where the title is such that the court cannot pronounce it with certainty either way, and that too it does not decide it but merely helps a party by way of avoiding any hardship that would be otherwise caused if some third person turned up afterwards and raised a dispute as to title against the purchaser after the completion of the contract. It does not lay down what amount of doubt upon a point is required to induce a court to refuse specific performance ; the section has the word " reasonable " ; it therefore depends on the fact of each case. The word " reasonable " contemplates a reasonable probability of litigation.² The Bombay High Court has recognized the same principle in *Haji Mahomed v. Musaji*³ viz., that a vendor

1. *De Souza v. Daphtary* (1923) 25 Bom. L. R. 610, 619.

Kisanlal v. Namdeo, 1 L. R. 1944 Nag. 90=211, I. C. 525.

2. *Mahomed Ali*, 2 Bom. L. R. 51.

3. *Haji Mahomed v. Musaji* 15 Bom. 657.

must in the absence of any contract to the contrary, be able to give a title free from reasonable doubt, if he wants a court of Equity to enforce the purchase.

The meaning of "a title free from reasonable doubt" was explained in *Pyrke v. Waddington*¹ as "a marketable title" which can at all times be forced upon an unwilling purchaser, and it was held that specific performance should not be allowed even though the court takes a favourable view of the title if it appears that its opinion may fairly and reasonably be questioned by other competent persons. A buyer is not bound to complete the sale if the title to the property is not free from reasonable doubt.²

Thus from the following decisions it will be clear that terms "Title free from reasonable doubt" and "marketable title" free from all reasonable doubt are synonymous.³

Illustrations of a doubtful title.—These are put together by *Fry* as under:—A title is said to be doubtful:—

(a) Where the probability of litigation ensuing against the purchaser in respect of the matter in doubt is considerable, or where there is "reasonable decent probability of litigation."

(b) Where there has been a decision by a court of co-ordinate jurisdiction adverse to the title, or to the principle on which it rests, though the court thinks that decision is wrong.

(c) Where there has been a decision in favour of the title which the court thinks wrong.

(d) Where the title rests on a presumption of a doubtful fact.

1. (1852) 10 Hare 1 ;

2. Lallubhai Rupchand v. Mohanlal Sakarchand (1934) 36 Bom. L. R. 1041.

3. Haji Usman v. Haron Saleh Mahomed 47 Bom. 369.

Krishnaji v. Ramchandra 33 Bom. L. R. 1377.

Lord & co. v. Jyoti Prasad 33 Bom. L. R. 1544.

(e) Where there is presumptive evidence of fact fatal to the title.

In *Haji Mahomed v. Musaji*¹ by an agreement for sale the plaintiff agreed that he would at the time of execution of the sale-deed hand over to the defendant "the title deeds" whatever there may be relating to the property within two years. After this period lapsed, the plaintiff sued for specific performance and the defendant urged that the plaintiff had failed to show a good title to the property, that he had not handed over to the defendant all the title-deeds and that he had after inspection of the deeds rescinded the contract on the ground that the title was not good. The court held the title defective and dismissed plaintiff's suit for specific performance.

In *Shrinivasdas v. Meherbai*,² the question was whether the vendor has made out "a marketable title free from reasonable doubt" which he contracted to do by a written agreement dated 13th October 1913 to sell certain land in Bombay. There had been a mortgage effected on the property on 26th April 1892 in favour of two joint mortgagees by a memorandum of charge duly registered, and a deposit of title deeds of the property. To deduce a good title it became necessary to prove that the mortgage had been discharged. As proof of that fact the vendor produced a certified copy of a release dated 30th September 1902 executed by one of the joint mortgagees which recited the death of the other mortgagee, the fact that his co-mortgagee was his sole heir and the redemption of the property from the equitable charge. One of the title-deeds was not produced by the vendor. It was held that the recitals in release were not evidence against the joint mortgagee and that the title contracted for had not been deduced.

[Instances of doubtful titles vary with the habits of each community and the specialities of each legal system.]

1 *Haji Mahomed v. Musaji* 15 Bom. 657.

2 44 I. A. 38, 41 Bom. 300 (P. C.) :

The principles above mentioned have been followed in cases mentioned below.¹

Such title as the vendor has—When one of the conditions of sale is that the purchaser shall take such title as the vendor has, such a stipulation implies that the vendor has some title, however defective it might be. Thus where it was found that the vendor had no title, he being a mortgagee and the mortgage being executed by one who was not the owner of the property, the vendor was not entitled to enforce specific performance.²

Plaintiff having made a previous Settlement thereof—This Cl. (c) adopts a part of the English rule laid down in *Sugden's Vendor and Purchaser* 392: viz., "that a contract to sell a settled estate to a person with full notice of the voluntary settlement will be enforced at the suit of the purchaser: but the seller cannot himself compel specific performance of the contract." The reason of this rule as discussed in *Johnson v. Ledgars*³ is that the seller has no equity to defeat the act which he has done himself. "The court will not", says *Fry* allow a voluntary settlor to force on an unwilling purchaser a title depending on the invalidity of the settlement.⁴ In cases falling under S. 24 (d) as we have already seen even the purchaser cannot enforce specific performance.

(f) *For whom contracts cannot be specifically enforced except with a variation.*

26, *Non-enforcement except with variation:—*

- 1 *Thambireddi Seshureddi v. Vangallu Mallareddi* A. I. R. 1935 Ma-L. 852; *Shamdas v. Kishanchand* A. I. R. 1928 Lah. 154; *Bai Dosibai v. Bai Dhanbai* 35 Bom. L. R. 1071; *Lakshmidas v. Sir D. Tata* 29 Bom. L. R. 19.
- 2 *Motivahoo v. Vinayak* 12 Bom. 1; *Mangal Singh v. Dyalchand* A. I. R. 1940 Lah. 159.
- 3 *Johnson v. Ledgars* T. & R. 204. 4 *Poter v. Nicols* L. R. 11 Eq. 291.

Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely)—

(a) where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed it to be when he entered into it ;

(b) where by fraud, mistake of fact, or surprise, the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff ;

(c) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it, relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part which adds to the contract, but which he refuses to fulfil ;

(d) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce ;

(e) where the parties have, subsequently to the execution of the contract, contracted to vary it

ILLUSTRATIONS.

(a) A, B and C sign a writing by which they purport to contract each to enter into a bond to D for Rs. 1,000. In a suit by D, to make A, B and C separately liable, each to the

extent of Rs. 1,000 they prove that the word "each" was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. D can obtain the performance sought only with the variation thus set up.

(b) A sues B to compel specific performance of a contract in writing to buy a dwelling house. B proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by B.

(c) A contracts in writing to let to B a wharf, together with a strip of A's land delineated in a map. Before signing the contract, B proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A's land of the same dimensions, and to this A expressly assented. B then signed the written contract. A cannot obtain specific performance of the written contract, except with the variation set up by B.

(d) A and B enter into negotiations for the purpose of securing land to B for his life, with remainder to his issue. They execute a contract, the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

(e) A contracts in writing to let a house to B, for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing; so with B's consent, A pulls it down and erects a new house in its place. B contracting orally to pay rent at Rs. 120 per mensem. B then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

NOTES.

Scope of the section.—S. 26 embodies the results of

many English cases of which *Woolam v. Hearn*¹ is the leading one and which recognizes the distinction between a plaintiff seeking and a defendant resisting specific performance. It is quite clear from Ss. 91 and 92 of the Indian Evidence Act that when the terms of a contract are reduced to writing a plaintiff cannot give oral evidence to make out a variation; but then that does not debar a defendant from showing that by reason of fraud or misrepresentation the writing does not contain the true contract; he can under proviso 1 to S. 92, give oral evidence to prove this; thus it is that proof of the variation is permitted to the defendant and a plaintiff in that case cannot have a decree unless he submits to the variation; the plaintiff is put on his election either to have his the action for specific performance dismissed or have it subject to the variation; but even if he elects not to accept the variation he does not lose his ordinary common law remedy of damages. This is the effect of S. 26, though in England there are dicta in some cases² to the effect that the plaintiff has no such option but to accept the specific performance with a variation. The scope and principle of this section is discussed at length by Tollenham, J. in *Narain Patro v. Aukhey Narain*³ thus:—
 “Section 26 does not apply unless there is a complete contract; it sets out cases in which contracts cannot be enforced except with a variation and there are five particular cases set out in which a contract may be enforced subject to a variation, such variation being in favour of the defendant and the section in our opinion assumes that the parties are agreed as to the existence of the contract but not agreed as to specific terms. The section provides that, when fraud or mistake of fact or misrepresentation has induced the defendant to sign an agreement, that agreement can only be enforced on the terms which the defendant intended to agree to. There is no provision of law of which we are aware which entitles the plaintiff to claim a variation in the terms of his contract when he finds that the contract itself cannot be carried out.”

1. *Woolam v. Hearn* 2 L. C. 468

2. *Fife v. Clayton* 13 Ves. 465; *Higinson v. Clowes* 15 Ves. 516.

3. 12 Cal. 152.

Where a person sues for Specific Performance of a written Contract and defendant sets up a variation, plaintiff must do equity and must give defendant an opportunity to prove variation.¹

There must be a complete contract in writing—

This section, as we have seen above, assumes the existence of a real contract. In *Narain Patro's* case where the certificated guardian of a certain minor agreed with another to sell to him some lands belonging to the minor at a certain price contingent upon the permission of the court which was necessary, it was held that that other could not specifically enforce that contract since being contingent upon the permission of the court, it was not a complete contract at any time ; so then a contract which itself cannot be carried out, cannot admit of a variation and cannot come under S. 26. S. 26 contemplates the case of a contract which is in writing, either required to be so by law or put down by agreement of the parties.

Difference in terms owing to fraud or mistake of fact—Cl. (a) contemplates the case of an error on the part of the defendant as to the terms, provided he is induced by fraud or mistake of fact : if it is the former it is due to the conduct of the other party ; if the latter, it is his alone. It is not necessary to discuss here the elements of fraud, mistake, &c. ; these words have the same meaning as in the Indian Contract Act. The word " fraud " does not include innocent misrepresentation as defined in S. 18, Indian Contract Act ; it does however include fraudulent misrepresentation be it actual or constructive. Remedies of the aggrieved party in case, of fraud will be found stated in notes to S. 19, Indian Contract Act. Briefly stated they are these:— (a) He may bring an action for damages or (b) he may defend an action for damages brought by the other side, (c) he may ask for rescission of the contract under S. 35, Specific

4 *Sunderbai v. Dwarkadas*. A. I. R. 1922. Bom. 336=70 I. C. 768.

Relief Act or (d) for cancellation of the instrument under S. 39 (e) or for rectification under S. 31 (f) or for variation under S. 26.

Mistake too, as we know, is recognized as a defence on the ground that there can be no consent when the two parties are not agreed to the same thing in the same sense. In case of mistake the aggrieved party can (a) set it up as a ground of defence to a suit for specific performance or (b) sue for rectification if it is mutual or (c) ask for rescission or (d) set it up to make out a case for variation under this section ; so far as S. 26 is concerned the defence goes to a part of the contract only ; it is corrected and not avoided as under S. 28 (a) ; besides it is set up as a defendant whereas for rectification and rescission he has to go as a plaintiff ; whether the case falls under S. 26 or S. 28 is a question depending on the facts of each case. Illustration (a) is an instance of this clause.

Reasonable misapprehension by the defendant as to the effect—This clause contemplates misapprehension not as to terms which are agreed to, but as to their legal effect ; but then it is not every misapprehension that vitiates the writing ; it must be a *reasonable one*, “ such as a man of ordinary capacity and using ordinary caution must still under the circumstances have fallen into.” The court must be satisfied that the agreement would not have been entered into if its effect had not been misunderstood. But for this limitation it would be iniquitable to recognize simple misapprehension as a defence, for, that would be opening a door to perjury and destroy the security of contracts. The misapprehension may be due to fraud or mistake of fact or surprise ; we have seen the import of the first term in note¹: we shall note now the force of the word “ *surprise*. ”

Surprise : This term is not defined anywhere ; it is not a technical term ; it merely means the state of being taken

1 *Ramsbottom v. Gosdon*, 1 V. & B. 765.

unawares if the person has acted without due deliberation and under confused and sudden impressions ; this term is used where something has been done which operated to mislead or confuse the party on the sudden : this term says *Collett* should not be used with laxity : As *Lord Somers* puts it in *Earl of Bath's case*¹ the word "surprise" is a word of general signification, so general and uncertain that it is impossible to fix it. A man is surprised in every rash and indiscreet action or whatsoever is not done with so much judgment as it ought to be ; but a court of equity gives relief only when the surprise is accompanied by such circumstances as indicate that the party had no opportunity to use suitable deliberation.

Difference between cls. (a) and (b)—Under cl. (a) the error is due to fraud or mistake of fact ; whereas under cl. (b) it may be due to either of those or even to surprise. Under cl. (a) it is always of fact. Under cl. (b) it may be even of law ; under cl. (a) the error is as to the terms themselves whereas under cl. (b) it is as to the legal effect of the terms ; under cl. (b) the misapprehension has to be reasonable and not arbitrary or trivial ; there is no such limitation in cl. (a).

Misrepresentation by the plaintiff as to an additional term—Under this clause the matter of defence is altogether outside the contract : it is an addition contemporaneous with the contract. The misrepresentation consists in plaintiff's making a statement however innocently which afterwards turns out to be untrue or in his having made some collateral promise which he now refuses to fulfil. It must be proved however that the defendant relied on that statement to his prejudice ; there need not to be fraudulent intention on plaintiff's part ; the misrepresentation may even be innocent. The case covered by this clause differs from that in cl. (e) as will be seen from note below. This clause was held

¹ 3 Ch. Cas. 56.

to apply in a case where the plaintiffs sued, for specific performance of an agreement in writing which set forth, *inter alia*, that the defendants agreed to sell under certain conditions as agreed upon, a share in a house and the defendants in defence to a suit for specific performance alleged that the written agreement did not contain the whole of the agreement between the parties and offered parol evidence in support of their contentions.¹

The contract as framed does not produce the desired legal result—Under this clause both parties are innocent and equally balked of their purpose through a mistake as to the legal result of their contract as framed ; their intention was to produce one legal result but by a mistake of fact or of law, quite a different result occurs ; the mistake may be of fact or law. The parties have indeed agreed as to their object—some legal result ; the error has crept in in expressing that agreement in writing. But then if the parties are agreed upon the law, there can be no relief whether their view be right or wrong ; the error may be due to somebody's carelessness or incompetence. A limit to the operation of this clause is laid down in *Croome v. Lediard*,² where it was said that if both parties with their eyes open draw up their contract in one way because they at the time think it best to do so, they cannot afterwards ask the court to make and execute a different contract for them, when facts after out otherwise than they calculated.

Agreement to vary the contract after its execution.—There is nothing to prevent a party to contract from entering into a subsequent contract so as to rescind or vary the first ; all that is necessary is that the subsequent agreement must be a valid one ; it must be a contract ; this follows from the words "*contracted to vary*"; in this case as in cl. (c) the matter of defence is outside the contract, with this difference that whereas under cl. (c) it is an addition

¹ *Cutts v. Brown*, 6 Cal. 328.

| ² 2 My & K. 251,

contemporaneous with the contract, under cl. (e) it is an addition or alteration subsequent to the contract ; under these clauses there is no suggestion of fraud or mistake or misrepresentation as in the other clauses ; this clause would not apply if the subsequent agreement is substitutive of the first and not a mere variation of it and such that the two cannot stand together.¹

This clause is not confined in its application to variations before breach of contract and parties may agree to vary terms obtain breach.²

Difference between plaintiff seeking and defendant resisting specific performance with variation—This is illustrated by the two leading Equity cases of *Woolam v. Hearne* and *Lord Townshend v. Stangroom*. The defendant can give oral evidence to prove the variation ; but the plaintiff seeking specific performance with a variation cannot give oral evidence to prove it ; he can if at all rely on documentary evidence ; he must otherwise elect to have specific performance subject to the variation or have his action for specific performance dismissed and rest content with damages only.

(g) Against whom Contracts may be specifically enforced.

27. Relief against parties and persons claiming under them by subsequent title.—Except as otherwise provided by this chapter, specific performance of a contract may be enforced against—

(a) either party thereto ;

(b) any other person claiming under him by a

1 *Moore v. Marrabbe*, L. R. I Ch. I.

2 *Ramiah v. Somaji* 29 M. L. J. 125.

title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a public company has entered into a contract and subsequently becomes amalgamated with another public company,—the new company which arises out of the amalgamation;

(e) when the promoters of a public company have before its incorporation, entered into a contract, the company provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

ILLUSTRATIONS

OF CLAUSE (b).—A contracts to convey certain land to B by a particular day. A dies intestate before that day without having conveyed the land. B may compel A's heir or other representatives in interest to perform the contract specifically.

A contracts to sell land to B for Rs. 5,000. A afterwards conveys the land for Rs. 6,000. to C, who has notice of the original contract. B may enforce specific performance of the contract as against C.

A contracts to sell land to B for Rs. 5000, B takes possession of the land. Afterwards A sells it to C, for Rs. 6,000. C makes no inquiry of B relating to his interest in the land. B's possession is sufficient to affect C with notice

of his interest and he may enforce specific performance of the contract against C.

A contracts in consideration Rs. 1,000 to bequeath certain of his lands to B. Immediately after the contract A dies, intestate and C takes out administration to his estate. B may enforce specific performance of the contract against C.

A contracts to sell certain land to B. Before the completion of the contract, A becomes a lunatic and C is appointed his committee. B may specifically enforce the contract against C.

OF CLAUSE (c).—A the tenant for life of an estate, with remainder, to B, in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C, who has notice of the settlement. Before the sale is completed A dies, C may enforce specific performance of the contract against B.

A and B are joint tenants of land, his undivided moiety of which either may alien in his life-time, but which subject to that right, devolves on the survivor. A contracts to sell his moiety to C and dies. C may enforce specific performance of the contract against B.

27-A.¹ Specific performance in case of part performance of contract to lease—Subject to the provisions of this chapter where a contract to lease immoveable property is made in writing signed by the parties thereto on their behalf, either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract if—

¹ This new section is added by Act XXI of 1929. Transfer of Property (Amendment) Supplementary Act 1929. It applies to contracts to lease executed after the first day of April 1930.

(a) where specific performance is claimed by the lessor, he has delivered possession of the property to the lessee in part performance of the contract; and

(b) where specific performance is claimed by the lessee, he has in part performance of the contract taken possession of the property or, being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract.

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

NOTES

General—Cl. (a) to section 27 lays down the general rule that a contract cannot be enforced against any one but a party to it: whereas cls. (b), (c) (d) and (e) give exception to that general rule; cls. (d) and (e) are the converse cases to those in cls. (c) and (b) of S. 23. The principle of *Imperial Ice Mfg. Co's case*² discussed under S. 23 applies to this clause also; cl. (e) would not apply to contracts to take shares being restricted only to contracts for the working purposes of the company.

Any person claiming under the original parties—

Cl. (b) applies to contracts which are executory agreements. The general principle of this clause is that from the time of the contract for the sale of the land, the vendor as to the land becomes a trustee for the vendee and the vendee as to the purchase money a trustee for the vendor, who has a lien

upon the land therefore ; every one coming in by subsequent and representative title and every subsequent purchaser from either with notice becomes subject to the same equities as the party would be to whom he succeeds or from whom he purchased. It follows from this clause that the maxim *actio pñronalis moritur cum personam* had no reference to legal proceedings arising from contract except where the contract involves personal skill of the defendant. This clause also applies where a property is contracted to be sold and that property is afterwards agreed to be sold to a third person ; in that case the latter, *i. e.*, the third person would be liable to perform the contract if he takes as a volunteer or where he has notice of the previous contract or has a mere equitable title with no better equity than the previous purchaser.

A contract, by which the parties agree that in case of any future transfer by one party of the immoveable property mentioned in the contract the transfer was to be made to the other property, is binding not only on the parties themselves but also on their representatives ; but such a contract cannot be specifically enforced as against a *bona fide* transferee for value without notice of the contract.¹

Notice.—It is not necessary to discuss here what is actual and what is constructive notice nor the effect of either. We have simply to note that if a third person buys a property with notice of a prior valid contract relating to the same property between the vendor and another, the person claiming under the previous contract can enforce his title against the subsequent purchaser and the claim of a vendee with notice of a prior agreement to sell cannot prevail as against the prior promisee's right to specific performance ; under S. 91 of the Trusts Act, the vendee must be held to have the

1 Shahzad Singh v. Jiachha Kunwar (1932) 54 All. 966.

Mst. Bonabai v. Chandra Bhaga A. I. R. 1931 Nag. 61. Gullupali Rarodu v. Kokku 1944 M. 554; Pitchayya v. Venkat Krishnayya A. I. R. 1943 Mad. 497.

property for the benefit of the prior promisee.¹ Where a tenant is in possession of land at the time of purchase by a third person, the latter is bound to make inquiry of the lease ; else he takes with notice of lessee's right² ; latter's purchase may have been registered and he may have obtained possession under his purchase.³ In the words of *Muthusami Iyer, J.*, the intention of clause (b) seems to be to adopt the equitable doctrine of notice in suit for specific performance to protect *bona fide* purchasers for value, and to treat at the same time purchasers with notice as persons purchasing subject to the vendor's pre-existing contractual obligation or with notice of a trust in favour of the party entitled to specific performance⁴ Notice before actual payment of the whole of the purchase-money even though it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice had before the contract.⁵ It may be noted that both the original contracting party and the transferee purchasing with notice can be jointly sued in the same suit.⁶

Registration operates as Notice—Explanation I to S. 3 of the Transfer of Property Act enacts that registration of a document is notice of its contents. Before this enactment the Bombay and Allahbad High Courts⁷ had held that registration is notice, whereas the Calcutta and Madras High Courts⁸ held a different view.

1 *Namisivayam* 18 Mad. 43 ; A.I.R. 1936 Mad. 949 *Arana Chala Theavar Maddappa Mavar*.

2 *Nandireddi* 14 M. L. T. 477 ; *Bahuram v. Madhab Chandra* 40 Cal. 565.

3 *Chundra Kaut v. Krishna Sundar* 10 Cal. 710 ; *Himatlal v. Vasudev*, 36 Bom. 446 ; *Nanbat Rai v. Dhinkal Singh* 33 All. 134 ; *Fakir Ibrahim v. Fakir Gulam* 45 Bom. 910.

4 *Kanan v. Krishna* 13 Mad. 329.

5 *Himatlal v. Vasudev* 36 Bom. 451 ; *T. R. Preti v. E. D. Sasson* A. I. R. 1936 Bom. 62.

6 *Gimani Ramcharan* 1 All. 555.

7 *Lakshmandas v. Dasrat* 6 Bom. 160 ; *Janki Persad v. Kishen Dutt* 16 All. 478 ; See also 30 All. 82, 31 All. 523.

8 *Preonath v. Ashutosh Ghosh* 27 Cal. 358. *Shan Maun Mull v. Madras Building Co.* 15 Mad. 268.

Burden of proof—Where in a suit for specific performance of contract of sale, the contract was established, but the subsequent purchaser pleaded *bona fide* purchase for value without notice, it was held that the contract was binding on the contracting party and every person deriving any interest from him since the contract, unless such person can show that he is a transferee in good faith for valuable consideration and without notice.¹

ILLUSTRATIONS.

A was in possession of certain land as an incumbrancer under a registered instrument; he verbally agreed with B the mortgagor to purchase it and B subsequently sold the land to C, under a conveyance which was registered with notice of A's mortgage and of the oral agreement with him; it was held that A was entitled to have the oral contract specifically enforced notwithstanding the subsequent registered sale.

In a suit for land it appeared that the plaintiff had obtained a registered sale deed of the property in question from the defendant who had already contracted (to the plaintiff's knowledge,) to sell it to another and that the plaintiff had paid no consideration for the sale deed which in fact represented a collusive transaction entered into to defeat the prior contract; it was held that the plaintiff was not entitled to recover.²

By an agreement dated 26th November 1926, the defendant No. 1 agreed to sell certain immovable property to the plaintiff. On the 22nd December 1926, defendant No. 1 sold the property to defendant No. 4 by a registered sale-deed. It was held in a suit by the plaintiff for specific performance

¹ Hem Chandra De Sarkar v. Amiyabala De Sarkar 52 Cal. 121; See also 36 Bom. 446; 38 All. 184; Baburam Bag v. Malhab Chandra 40 Cal. 565; Bhup Narain Singh v. Gokul Chand Mahton (1934) 36 Bom. L. R. 421.

² Kanan v. Krishna, 13 Mad., 329.

³ Vamasuyam v. Nelayaha, 18 Mad. 43.

of the agreement of 26th November 1926 that the plaintiff was entitled to enforce the agreement against defendant No. 4, the subsequent transferee of the property.¹

Illustration to cl. (b)—The first, fourth and fifth illustrations are instances of defendant and representative titles to the original party to the contract; in the first and fourth the original party is dead, and in the fifth he becomes a lunatic; the second and the third illustrations are in substance the same as illustrations (g) and (h) to S. 3 defining trust.

Defendant No. 1 mortgaged his property with possession to the plaintiff and agreed, on 4th March, 1917, to sell the property to him. On 19th January, 1918 defendant No. 1 executed a registered sale deed of the property to defendant No. 2, who though he knew that the plaintiff was in possession, made no inquiry as to the circumstances under which the plaintiff was in possession. The plaintiff having sued for specific performance of the agreement to sell, it was held, decreeing the plaintiff's claim, that defendant No. 2 having knowledge of the plaintiff being in possession and having made no inquiry why the plaintiff was in possession, must be taken to have had constructive notice of all the equities in favour of the plaintiff.²

The following are given by *Dart* as examples under cl. (b).

The vendor's assignees or trustees in bankruptcy, or committees in lunacy or voluntary alienees or judgment creditor's or the after taken wife or husband of the vendor or the vendor's alienees for value (if they purchased with notice of the prior contract or have not taken a conveyance) or (in case of his death) his real or personal representatives.

Clause (b) applies not only to sales, but to leases.³

1. Bhup Narain Singh v. Gool Chand Mahton, 36 Bom. L. R. 421.

2. Faki Ibrahim v. Faki Gulam Mohidin, 13 Bom. L. R. p. 335; Baburam v. Madhab Chandra 40 C. I. 565.

3. Gaffur v. Bhicaji 26 Bom. 159.

Clause (c) —Pollock rightly says “ cl. (c) is so worded as to be barely intelligible without the illustrations. The word ‘defendant’ at the end stands, in point of sense, for some such words as ‘original contracting party from whom that title is derived, The following propositions are well settled.

(1) It is not within the competence of a guardian of a minor to enter into contract for the purchase of immoveable property and contract cannot be specifically enforced either on his behalf or against him. (2) A manager of joint Hindu family which includes minors can enter into contract for the sale or purchase of immoveable property and contract can be specifically enforced against family including minors. There is a distinction between contract by.....guardian and manager of joint Hindu Family. Contract by manager can be specifically enforced if manager has acted for the benefit of family. In case of guardian, there is lack of mutuality and hence contract is void.¹

The second illustration to clause (c) of S. 27 of the Specific Relief Act, applies to the case of all joint tenants, whether members of a joint Hindu family or not.²

One B and his three sons jointly owned one anna share in a khoti village. B agreed to sell his three pies share to the plaintiff. Before the sale could be completed, B died and a suit for specific performance was brought against his sons. It was held that the plaintiff could enforce the contract for sale of B's interest by a suit for specific performance against B's sons.²

In these cases the peculiarity is that in form the contract is enforced against one who was no party to it ; but in substance the title acquired under the contract prevails against

1. Ramrao v. Sugan Chandra, 1946 N. L. J. 43.

2. Ramappa v. Yellappa 52 Bom. 312; Bhagwan v. Krishnaji, 44 Bom. 967;

3. Abdullah V. Ahmed AIR. 1929 All. 817.

that of another which was displaced by it; apparently the original contracting party does not come in the position of a defendant. The basis of this clause is that *equity regards that as done, what is agreed to be done*; but there would be no specific performance if the agreement by the original party is defective in some respects such that it could not have been enforced against him if he were living.¹

S. 53-A of the Transfer of Property Act and S. 27-A of the Specific Relief Act adopt the English equitable doctrine of part performance, but with certain alterations and restrictions.

Under the conditions set out in (a) and (b) of S. 27-A, either party may enforce specific performance of the contract, where the contract to lease immoveable property is in writing, and though required to be registered, has not been registered. The section supersedes the decision in *Sanjib Chandra v. Santosh Kumar*² where it was held that an agreement of lease inadmissible in evidence for want of registration would not support a suit for specific performance even though the lessee had taken possession under the agreement.³

Ruling of 49 Cal. 507 has been dissented in subsequent decision³ where it is clearly laid down that Sec. 27A does not abrogate the right to specific performance of an oral agreement to lease which is given by Sec. 12 of the Act.

(h) Against whom contracts cannot be enforced.

28. *What parties cannot be compelled to perform*—Specific performance of a contract cannot be

1. *Wilbains v. Walker* 9 Q. B. D. 581.

2. (1921) 49 Cal. 507.

3. A. I. R. 1936 Nag. 115. *Hariprasad v. Hanumant Rao*.
Gocul Chandra v. Haji Mohammed A. I. R. 1938 Cal. 136.
Carrimbhoy v. Creff. 60 Cal. 980.

enforced against a party thereto in any of the following cases;—

(a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances, evidence of fraud or of undue advantage taken by the plaintiff ;

(b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled ;

(c) if his assent was given under the influence of mistake of fact, misapprehension or surprise : Provided that when the contract provides for compensation in case of mistake, compensation can be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

ILLUSTRATIONS.

To clause (c)—A, one of two executors, in the erroneous belief that he had the authority of his co-executor enters into an agreement for the sale to B of his testator's property. B cannot insist on the sale being completed. .

A directs an auctioneer to sell certain land ; A afterwards revokes the auctioneer's authority as to 20 bighas of his land, but the auctioneer inadvertently sells the whole to

B, who has no notice of the revocation. B cannot enforce specific performance of the agreement.

NOTES.

Scope of the Section.—This section lays down certain defences based on certain grounds; these are for the defendant; if a person relies on these grounds as a plaintiff, and comes to court for relief, *i. e.*, to set aside the contract, he has to come under S. 35 or 39, though the grounds of attack there laid down are little different; under this section the defence goes to the whole contract; if it goes to a part only, the case would be under S. 26, which has its counterpart in S. 31; Cases falling under S. 28 differ from those in S. 22, Cl. (b); there the contract is avoided not so much on personal grounds as in S. 28; here the main feature is the faulty conduct of the plaintiff.

Minors:—It is significant that this section which mentions all persons against whom specific performance cannot be decreed; does not say anything as to a minor; a minor's contract is now void as held by the P. C. in *Dharmadas v. Mohribibi*¹ but though he cannot enter into contracts, this does not exclude the power of his guardian to represent him and enter into contracts on his behalf.²

Inadequacy of consideration, how far a defence—This Cl. (a) gives expression to the modern rule; the older rule was that inadequacy of consideration was in itself a ground of defence to specific performance since it was regarded as a circumstance of hardship; but the practical result of the old rule was to prevent a man selling his property at less than its value however desirous he might be to part with it; the modern rule now prevailing is that inadequacy of consideration is not *per se* a ground for relieving a man from a contract which he has wittingly and willingly entered

1. 30 Cal. 539.

2. *Krishnaswami v. Sundarapayar* 13 Mad. 415.

into. Hardship is in itself no defence, under S. 28 the only ground on which this can be pleaded as a defence is that it may afford evidence of fraud or of undue advantage taken by the plaintiff ; in another words "fraud or undue advantage" are the real grounds of relief though inadequacy of consideration can evidence it. The alleged inadequacy may be on either side—either on the side of the vendor or of the purchaser : *i. e.*, the seller may show that the estate is vastly more valuable than the price agreed on ; the buyer can show that the price he has got to pay is altogether in excess of the intrinsic value of the property. The value of a thing admits of no precise standard but fluctuates with varying circumstances and a man is often eager to sell for less at one time than he would at another time ; the pressure under which he may have acted may not in any way be due to the other party who may have bought it only because of cheapness ; the court has therefore to exercise much care in accepting mere inadequacy of consideration as a defence. The Legislature therefore requires the proof of consideration being *grossly inadequate*, and besides the court has to regard only the *state of things existing at the date of the contract* and not to determine the inadequacy by light of subsequent events. The court has then to find as a fact whether that gross inadequacy of consideration as viewed from the facts existing at the date of the contract is evidence of fraud or of undue advantage taken by the plaintiff ; it can be inferred from the inadequacy of consideration or from other accompanying circumstances, *e. g.*, fraud, misrepresentation, studied suppression of the true value of the property, or with any circumstances of oppression or even of ignorance. Inadequacy of consideration in conjunction with the circumstances of the indebtedness and ignorance of the vendor are facts from which a court may infer the exercise of undue influence. It is for the defendant to show that the gross inadequacy of consider-

1. Griffith v. Spartle 1 Cox. 30.

2. Bhimbhagat v. Yeshwantrao 25 Bom. 126.

ation is such as to render the bargain one which no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other, *i.e.*, it would shock the conscience of an honest man ;—there is no rule that a court will not decree specific performance of an agreement to sell a reversionary interest when the purchase money was less than the market value of the reversion.¹ It is not necessary to prove fraud as strictly defined ; it is enough to show that an undue advantage has been taken ; one is said to have taken “ undue advantage ” when there is proof of circumstances which have misled, confused or disturbed the just result of his judgment and have thus exposed him to be the victim of the artful, the importunate and the cunning. The words “ undue advantage ” have to be read with the word “ fraud ” in this clause ; the clause read together would seem to relieve against fraud in its wider sense as used in equity, *i. e.*, in all cases of acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence and which are injurious to another or by which an undue advantage is taken of another. The legislature has wisely refrained from defining the term, for else it would limit and cramp the jurisdiction of a court of equity.

*Falck v. Gray*² is the strongest case illustrating the old rule.

Mortimer v. Cooper,³ an annuity for life formed part of the consideration and the life dropped before any payment was made ; it was held that since the court has only to have regard to the facts existing at the date of the contract, the consideration was not necessarily inadequate.

If consent is wrongfully obtained—In this clause as in S. 26 (a) and (c) we find the same elements with this difference that there it is made a ground for variation, whereas in this case the defence goes to the whole contract ; again in

1. *Gitabai*, 17 Bom. 232. | 2. 5 Jur. N. S. | 3. *Bro. C. C.*

this clause there is not as in S. 21 any intrinsic defect in the contract itself, but the ground of defence is purely personal to the defendant just as it is personal to the plaintiff in S. 24; the ground of relief is that his assent to an otherwise proper act was improperly obtained by conduct extraneous to the contract: clause (b) as will be seen from the words used therein is a very wide one, purporting to include all cases where the contract would be voidable because of the circumstances under which the assent of the defendant was obtained. It is for the defendant to prove this fact; he must make out that the wrongful element complained of was really the cause of his consent; it need not necessarily have been the sole inducement to the contract¹ however it must be the very circumstance that gave rise to the contract. In this connection S. 19, of the Indian Contract Act should be noted; it says that fraud or misrepresentation which did not cause the consent to a contract of that other does not render the contract voidable; but then misrepresentation is no defence if the party had the means of discovering the truth with ordinary diligence. It is the misconduct of the plaintiff or his authorized agent only that can be set up as a defence under this clause; the fact that the plaintiff himself is personally free from blame is immaterial. The defence can be set up even against plaintiff who is an assignee of the contract for he is the party "to whom performance would be due" but if misrepresentation is practised on A and A has assigned the contract to B who is not affected by the original misrepresentation, B cannot set up the defence though A could have.²

It should be noted that in this clause the legislature does not use the word "fraud" but puts the general words "concealment, circumvention or unfair practices"; these are technical words nowhere defined; it follows therefore that this clause would cover all cases of unfair practices which may not fall within the definition of the term "fraud"; misrepresentation,

1. *Clark v. Dixon* 6 C. N. R. S. 453.

2. *Smith v. Clarks* 12 Ves. 477.

wilful or innocent, comes under this clause; it may be the result of misunderstanding or forgetfulness; yet it would be a defence, even though there be a clause for compensation. The term "circumvention" would mean any act fitted to deceive.

*Philip v. Homfray.*² If a man knows that he has committed a trespass on his neighbour's property and finding it convenient to screen himself from the consequences makes an offer to purchase that property, he is bound to communicate to that other the exact circumstances.

*Davis v. Casey.*³ Premises were sold for business purposes and restrictive covenants as to the kind of business allowable were concealed by the vendor; specific performance was refused.

*Smith v. Land Corporation.*⁴ A misrepresentation that an intended tenant was a desirable tenant when as a matter of fact he was in arrears with his rent was held a ground of defence.

*Ellard v. Lord Landaff.*⁵ A lessee obtained the renewal of a lease on the surrender of an old one knowing and suppressing the fact which was unknown to the lessor that the person on whose life the old lease was, was *in extremis*; specific performance to the lessee was refused. because concealment as contemplated by this clause need not always be fraudulent.

Consent given under a mistake Cl. (c)—This clause differs from Cl. (b) in two respects; *firstly* that the assent of the defendant is not obtained by any wrongful conduct of the plaintiff but has been given by the defendant under the influence of any of the causes (mentioned in the

1. Fawcett v. Holmes 42 Ch. D. 150.

2. L. R. 6 Ch. 779.

3. 40 Ch. D. 601.

4. 28 Ch. D. 7.

5. 1 B. & B. 241.

clause) which was the operative motive to his assent ; *secondly*, that a proviso is introduced limiting the scope of the clause if there is any provision in the contract for compensation in the case of mistake. A case coming under the proviso would not necessarily come under S. 14. It must be noted however that the proviso as to compensation does not limit the purchaser to such compensation only as is fixed therein ; the defendant's right to compensation is always cumulative to his ordinary right to performance with compensation as under S. 14. or 19. It will be seen from the illustrations that they are examples of cases in which the plaintiff is free from all fault and the defendant by his own carelessness or mistake has led the plaintiff to make with him the contract which so far as the plaintiff could judge he was fully competent to make.

Mistake of fact or misapprehension—This clause does not recognize mistake of law as a defence ; a mistake of fact is a defence even when it is unilateral ; it need not be mutual as in Ss. 31 and 35, or as in S. 20, Indian Contract Act ; but then the mistake must be as to a fact material to the agreement ; S. 28, Cl. (c) merely says that if there is a mistake of fact, specific performances may be refused ; it does not lay down that the innocent plaintiff who has in no way contributed to the defendant's mistake is to be without his remedy, *i. e.*, damages.¹ It is not sufficient for the defendant merely to allege a mistake ; he must show something that might have reasonably led to it ; he is not entitled to relief if he was reckless or negligent, or if the circumstances are such that no man with his senses about him would have made the error, *e. g.*, where the plans and descriptions of property sold are clear but the defendant acts carelessly on his own knowledge of the matter. This clause differs from S. 35 inasmuch as here mistake is a ground of defence while under S. 35 it is a ground of attack. The term mistake is distinguishable from misapprehension in that respect : the latter is wider than mistake of fact ; the term seems to have been put in to prevent the

1, *Tamlin v. Jones* 15 Ch. D. 222.

defence being limited to what is technically a mistake of fact; there is a mistake of fact when a person erroneously believes in the existence or otherwise of a particular fact or when he is actuated by an imperfect knowledge of fact; but when he knows all the facts as they really exist but misconceives their bearing or relation to one another or the ordinary consequences that follow from them, he is said to have acted under a misapprehension of fact. It need not necessarily be reasonable as is limited in S. 26. This clause does not include misapprehension of law; mistake of fact is generally as to "terms"; misapprehension is a mistake as to its effects.

Illustrations—The first illustration is taken from *Snessby v. Thorne*,¹ the second is taken from *Manser v. Back*;² in both these cases the defendant is not without any power or authority to make the contract he assumes to do, but he mistakes the extent of his power of authority.

Malins v. Freeman.³ A person through his own error bought the wrong property at an auction; specific performance was refused.

(i) The effect of dismissing a suit for specific performance.

29. Bar of suit for breach after dismissal—The dismissal of a suit for specific performance of a contract or part thereof, shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

NOTES.

The plaintiff may ask for the relief as to damages in his suit for specific performance as prescribed by S. 19.

If a suit for specific performance is dismissed, the court

1. 7 D. M. & G. 399. | 2. 6 Hare 443. | 3. 2 Ke. 25.

can nevertheless give the plaintiff a decree for refund of the deposit or purchase money although he had not asked for any such alternative relief. *Ragunath Sahay*.¹

In *Govind Appaji v. Miraji Rama*,² where a prior suit for specific performance was dismissed as plaintiff was in breach, it was held that subsequent suit for refund of purchase money was not barred under this Section as the refund of deposit or purchase money is not a claim for compensation under Section 19.

In *Hanmantlal and others v. Badidas*,³ also, it was similarly held.

Limitation;—In a suit for return of deposit or purchase money after the dismissal of suit for specific performance, the starting point for purposes of limitation would be the date of dismissal of the suit under Art. 97 of Limitation Act.

(j) Awards and Directions to execute settlements.

*30. Application of preceding sections to awards and testamentary directions to execute settlements—*The provisions of this chapter as to contracts shall *mutatis mutandis* apply to awards and to directions in a will or codicil to execute a particular settlement.

NOTES

Awards—An award is put on the footing of a contract for the purposes of specific performance. By the submission to arbitration, the parties contract to do what the arbitrator shall direct them to do when he makes his decision; and so an award is considered in equity to amount to an agreement

1. 15 I. C. 268.

2. 1944 Nag. I.L.R. 718=A. I. R. 1945 Nag. 67.

3. A. I. R. 1945 Allh. 278.

by the parties on the terms pointed out by him ; of course the acts to be done must be such as the court would enforce if found in an ordinary agreement ; they should not be illegal. Mere hardship or unreasonableness in the award itself is not a ground for refusal of specific performance though it would be if the same were in the submission to arbitration ; the award should not be excessive, defective or uncertain.¹ The doctrine of specific performance of contracts is applied to the awards because as observed by *Lord Eldon* in *Wood v. Giffith*² "the award presupposes an agreement between the parties and contains no more than the terms of the agreement ascertained by a third person."

A party to an award has no right to enforce it by suit as such suit is expressly barred by Section 32 of the Arbitration Act 1940. This Section cannot over ride Section 32 of the Arbitration Act.³

All that S. 30 of the Specific Relief Act lays down is that when the question is one of specific performance, the court has the same powers and should proceed upon the same principles in the case of an award as in the case of a contract.⁴

Limitation—It was held in earlier Allahabad cases that a suit for the specific performance of the terms of an award should be regarded as a suit for the specific performance of a contract and governed by Art. 113 of the Limitation Act. There is nothing in S. 30 which places awards on the same footing as contracts for the purpose of limitation. A suit to enforce the terms of an award is governed by the residuary article 120 of the Limitation Act.⁵

Settlements—As to specific performance of executory

1 *Nickles v. Bawock*, 7 D. M. & G. 300.

2 1 Sim. 54.

3 *Moolchand Jethajee v. Rasid Jamsheer Sons & Co.*—(1946) M. L. J. 185.

4 *Kuldip v. Mahaul* 34 All. 43.

5 34 All. 43.

settlements under a will, the following observation of Collett may be noted; "so long as the settlement directed remained executory, any party interested under it may sue the trustees or other representatives in whom the property has become vested to enforce the execution of the directions in the will, for the conveyance or other disposal of the property; and this is the kind of specific performance contemplated by this section, and then in substance the suit will be such a one as is contemplated by S. 12, Cl. (a). When the directions in the will have been so far carried out that the settlement has become an executed one, than the instrument embodying the settlement may be enforced specifically for and against the like parties as an ordinary trust deed may be."

CHAPTER III

OF THE RECTIFICATION OF INSTRUMENTS.

31. *When instrument. may be rectified*—When through fraud or mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified; and if the court find it clearly proved that there has been fraud or mistake in framing the instrument and ascertain the real intention of the parties in executing the same the court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to right acquired by third persons in good faith and for value.

ILLUSTRATIONS

(a) A, intending to sell to B his house and one of the three godowns adjacent to it, executes a conveyance prepared by B, in which through B's fraud, all three godowns are included. Of the two godowns which were fraudulently included, B gives one to C and lets the other to D for a rent, neither C nor D having any knowledge of the fraud. The conveyance may, as against B and C be rectified so as to exclude from it the godown given to C; but it cannot be rectified so as to affect D's lease.

(b) By a marriage settlement, A, the father of B, the intended wife, covenants with C, the intended husband to pay to C, his executors, administrators and assigns, during A's life, an annuity of Rs. 5,000, C dies insolvent, and the

official assignee claims the annuity from A. The court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

NOTES

Scope of Chapter III—The specific relief given by this chapter has to be distinguished from that given by Ss. 26, 28 and 35; under Ss. 26 and 28 no doubt, fraud or mistake is set up as a defence; but there in the one it is with a view to enforce a variation on the plaintiff; in the other, it goes as a defence to the entire contract; again this differs from relief given by Ch. IV inasmuch as there the aggrieved party comes as a plaintiff and asks for rescission of the contract, whereas here he does not ask to be relieved from the contract altogether but desires to correct an error and carry out the true intentions of the parties. Under this chapter "the fundamental assumption is that there exists in truth between the parties a complete, and perfectly unobjectionable contract, but the writing designed to embody it, either from fraud or mutual mistake, is incorrect or imperfect and the relief sought is to rectify the writing so as to bring it into conformity with the true intent. In such a case to enforce the instrument as it stands must be to injure at least one party to it; to rescind it altogether must be to injure both, but to rectify it and then enforce it is to injure neither but to carry out the intention of both. In cases of rectification the Court does not put it to the other party to submit to the variation alleged but makes the instrument conformable to the intention of the parties without any such offer or submission."

The chapter consists of four sections. S. 31 sets out the general conditions of relief; Ss. 32 and 33 emphasize the fact that the instrument is to be rectified in accordance

with the real intention of the parties and S. 34 partially adopts the later English doctrine as to rectifying and then enforcing specifically a written agreement if the plaintiff has so prayed in his plaint and if the Court thinks fit.

An aggrieved party should seek assistance of the Court under this Section without unreasonable delay. Mere laches is not bad to a suit for rectification of deed on the ground of mutual mistake if the rights of third parties have not intervened. The date of notice of mistake is the date from which time runs.¹

Principle of the rule—It would not be out of place to give here the general rule and the Principle thereof as discussed by Story: " Sometimes the written agreement contains more, sometimes it simply varies from their intent by expressing something different in substance from the truth of that intent. In all such cases if the mistake is clearly made out by entirely satisfactory proofs, equity reforms the written instrument so as to make it conformable to the precise intent of the parties. A court of equity would be of little value if it could suppress only positive frauds and leave initial mistakes innocently made to work intolerable mischiefs contrary to the intention of the parties. Refusing relief in cases where there has been innocent omission or insertion of a material stipulation contrary to the intent of both parties and under a mutual mistake, would be to work a surprise of fraud upon both."

*Anaruli v. Kailashchandra.*² A party to a contract of tenancy desirous of having it rectified must come under S. 31.

Fundamental rules—The application of this doctrine involves the following rules:—

(i) There must have been a genuine agreement (a prior

1 Nooruddin Esmailji Kurwa. v. Mohammad Umar A. I. R. 1940 Bom. 321.

2 8 Cal. 118,

actual contract) different from the expressed agreement. Thus a policy cannot be rectified by a slip because the slip does not constitute a contract.¹

(ii) There must be fraud or mistake; but mistake as a ground for rectification must be mutual; a court will not act on proof of what was intended by one party only:² of course a court will not interfere if there be intentional omissions; e. g., as was in *Lord Irnham v. Child*³ where the parties to a contract for annuity designedly omitted to fulfil a promise for redemption thinking it would render the transaction usurious: It must be noted that the court has to consider not what the parties would have done had they been able to anticipate subsequent developments, but what was their intention at the time the contract was executed,

(iii) If the original agreement is ambiguous in its terms extrinsic oral evidence is admissible to ascertain the true intent of the parties.

Evidence—There must be clear proof of fraud or mistake; in order to establish a right to rectification, the plaintiff must establish that the alleged intention to which he desires it to be made conformable, continued concurrently in the minds of all parties up to the time of its execution and must also show precisely the form to which the deed ought to be brought.⁴

Through fraud—The cause of the instrument not truly expressing the intention of the parties must be fraud or mistake; there can be no rectification if neither can be proved.⁵ In this case a mortgagor alleged that a sum in

1 *Morocco Land Trading Co. v. Fry* 13 W. R. 10; *Mackenzie v. Wilson*, L. R. 8 Eq. 368.

2 *Fowler v. Fowler* 4 Deg. & J. 50.

3 Bro. C. C. 82.

4 *Madhavji v. Ramnath* 30 Bom. 457. *Sayamma Venkata Peddy* 54 Mad 973.

5 *Amanat Bibi v. Lachman* 14 Cal. 308; 14. L. A. 18.

excess of his debt to the mortgagee had been inserted in the instrument; but on the facts there being no reason to suppose that there was any fraud or deceit on the part of the mortgagee, or that there was any mutual mistake of the parties as to the amount stated as that for which the security was given, a suit under S. 31 to have the deed rectified was held by the Privy Council to have been rightly dismissed.

Mistake must be mutual—The word “mistake” in S. 31 is not qualified by any term; it would therefore extend to mistakes both of fact and law; so far as S. 31 is concerned, the ground for relief in both the cases is the same, *viz.*, that owing to the mistake the minds of the parties have not met and therefore there has been no real instrument. But then whatever sort of mistake it may be, it must be mutual. When the mistake is not mutual, but on the part of one party only, there can be no rectification. A plaintiff seeking rectification must show that there was an actual concluded contract antecedent to the instrument sought to be rectified and that such contract is inaccurately represented in the instrument.¹ If both the parties took different views of what was intended there would be no contract at all between them which could be carried into effect by rectifying the instrument. It can be allowed when all executed an instrument under a common mistake and have done what none of them intended; rectifying a contract where the mistake is on one side only is in effect making for one party a new contract different from what he intended;—there can be no rectification where the parties have intentionally omitted to insert certain terms in a document; what is done on purpose cannot be said to have been done under a mistake.³ This principle is often

1 *Haji Abdul Rehman v. The Bombay and Persian Steam Navigation Co.*
16 Bom. 561.

2 *Duke of Sutherland v. Heatcote* (1892) 1 Ch. 475; *Harris v. Pepperal*
L. R. 5 Eq.; *Bloomer v. Spittle* L. R. 13 Eq. 417, *Page v. Marshall*
28 Ch. D. 255.

3 *Lachman Rao, Nag.* L. R. 49.

applied in the case of vendors and purchasers when more land is included in the sale deed than vendor intended to sell.

Principles above mentioned were considered in a Privy Council case where it was held that plaintiff seeking rectification of a written contract had failed to prove that the word 'Ship' was used by them for 'delivery' by mistake, which negatived case of mutual mistake, and hence no relief could be granted to plaintiff under Section 31 of specific relief Act.¹

Any instrument in writing can be rectified—The relief is not limited to contracts only ; it is applicable even to instruments independent of contract, e. g., wills, instruments made in exercise of powers; it is enough if it is an instrument in writing.

Intention not properly expressed—The court has to see " what was the intention of the parties at the time of its execution and not what they should have done if the result of what they did had been present to them." "*Intention*" means, as S. 33 indicates, intention as to the meaning and legal effects of the instruments and not merely as to the language in which they were to be expressed ; the form of words in which the document is clothed is immaterial; the court merely looks to the substance of the matter; it follows that, this section will not apply to intentional omissions though the motive of omission be a mistake of law.² It has been held that, rectification is not necessary if the document is not necessary to plaintiff's case ; the document would be necessary if the suit be for specific per-

1 A. I. R. 1946 P. C. Messrs Siddique and Co. Vs. Messrs Uttomal and Assunmal and Co.

2 Parkar v. Taswell 2 D. & J. 559 ; Innham v. Child, 1 Bro. C. C. 92 ; Wilkinson v. Nelson 7 Jur. N. S. 483.

formance of a contract.¹ As observed by *Jenkins; C. J. in Dagdu v. Bhana*² " the court administering equitable principles permits a mistake to be proved where the expression of the contract is contrary to the concurrent intention of all the parties; rectification is allowed when such mistake is established. What is rectified is not the agreement but the mistaken expression of it." It was held in a Madras case that the fact that mortgage has ripened into a decree for sale is not enough to preclude the court from rectifying the mortgage deed on the ground of mistake.³

Who can sue for rectification—" A Court of equity " says *Story* will interfere only as between the original parties, or those claiming under them, e. g., heirs, devisees, legatees, assignees with notice ; no relief is granted against a *bond fide* purchaser for value without notice."

It must be "clearly proved"—We have seen the danger of affording relief in all cases by allowing parties to set aside their solemn engagements and also of refusing relief always; the legislature therefore authorizes a court of equity to interfere to rectify only if the evidence amounts to a proof clear and satisfactory; the evidence of fraud or mutual mistake and of the intention should be clear of all reasonable doubt. Under the terms of the section, it is necessary that the court should find it clearly proved that there was such mistake.⁴ No relief should be given if the evidence is loose or equivocal, or in its texture open to opposing presumptions. Parties can put in evidence, preliminary documents, drafts or letters to prove their intention, as also they can give oral evidence. If oral evidence is as let in, it must be the strongest possible. The party seeking rectification should come to court as soon as possible after he comes to know of his right.

1 Mahamed v. Chaterputsing 20 Cal. 354.

2 28 Bom. 420.

3 Latchayya v. Seethamma A. 1. R. 1932 Mad. 276=62 M. L. J. 350.

4 Madhavji v. Ramuath 30 Bom. 458.

Illustrations—Illu. (a) is a case where the relief is allowed on the ground of fraud and yet limited is its application against third person. Illus. (b) is a case where relief is given on the ground of mutual mistake as to the result, actual or legal, of the terms used.

A mortgages certain land to B. In the mortgage Bond S. No. 49 d is inserted by common mistake for S. No. 49 A. Subsequently A mortgages it to C. who has knowledge of mistake. B's mortgage deed may be rectified. C cannot be said to have acquired right in good faith and his deed cannot be rectified.¹

Counterclaim for rectification—Generally the relief by way of rectification is confined to suit, but a defendant may counterclaim for rectification where the counterclaim is permitted by the rules of the court. In the Mofussil courts where the counterclaim is not permitted the courts guided by the principles of justice, equity and good conscience can give effect as a plea to those facts which in a suit brought for that purpose would entitle a plaintiff to rectification..² The Calcutta High Court,³ however, holds a different view—According to that court, if the defendant wishes to have the contract rectified or altered, he should bring a suit for that purpose. It is submitted that the former view, *i. e.*, the Bombay High Court view, is correct, but in the subsequent case mentioned below⁴ Calcutta High Court has followed Bombay Ruling and hence old Calcutta Ruling is dissented.

1 Mahadeva v Gopala 34 Mad. 51. Shaikh Barsati v Surji 14 Luck. 306 (1938) Venkata Challeem v. P. L. A. R. M. Turi. A. I R. 1939 Rang. 90.

2 Dagdu v. Bhanu 28 Bom. 426.

3 Amarullah v. Kaylash 8 Cal. 118.

Nandi Ram v, Jegendra 36 C. L. J. 421 Binns V. W. & T. Avery 61 Cal. 548.

32. *Presumption as to intent of parties*—For the purpose of rectifying a contract in writing, the court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

NOTES

Scope—it is limited to the rectification of *contracts* only that are in writing. S. 32 is an application of the maxim "he who comes into equity must come with clean hands." A party seeking rectification has certainly to show that there was a prior actual contract between them but that is not enough ; he must also show that the agreement intended to be embodied is an equitable and conscientious one. The principle of this section is clear. It is useless to rectify a written contract if when the writing is brought into conformity with the agreement as originally intended, the result would be to establish contract, which is such, in its nature, that it would be against equity and good conscience to grant any relief upon it.

33. *Principles of rectification*—In rectifying a written instrument, the court may inquire what the instrument was intended to mean and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

NOTES

Principle of this section—This principle on which an English court of equity acts in correcting an instrument is that the parties are to be placed in the same situation as they would have stood in if the error to be corrected had not been made.

To put briefly the principle is—Does the deed as drawn

up go beyond the instruction and intention of the parties ? We have already noticed under S. 31, the purport and limits of the rule laid down in S. 33. The section only says that the inquiry is to be as to what was the intention of the parties at the time the contract was executed. Rectification is not allowed if after the error is corrected the instrument would not express the understanding of both the parties at the time of the making of the contract.

34. *Specific enforcement of rectified contract*
—A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the court thinks fit, is specifically enforced.

ILLUSTRATION

A contracts in writing to pay his attorney B, a fixed sum in lieu of costs. The contract mistakes as to the name and rights of the client, which if construed strictly would exclude B from all right under it. B is entitled, if the court thinks fit, to have it rectified and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

NOTES

S. 34 is permissive and not compulsory—This section merely gives a discretion to the court to grant specific-performance along with rectification. It in no way imposes an obligation on the court to do it. In order to avoid multiplicity of suits, both rectification and enforcement of the contract are provided for in the same suit under this section. In a recent Madras case, it has been held that it is open to plaintiff or defendant in a suit to adduce oral evidence in regard to correct description of property in a conveyance executed between them and relief in regard to them may be granted even though suit for rectification is not filed and even though filed, it would be time parred,¹

¹ Soorama V Venkayya A. I. R. 1933 Mad. 589=176 I. C. 875.

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

35. *When rescission may be adjudged*—Any person interested in a contract (in writing) may sue to have it rescinded, and such rescission may be adjudged by the court in any of the following cases, namely:—

(a) Where the contract is voidable or terminable by the plaintiff;

(b) Where the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff;

(c) Where a decree for specific performance of a contract of sale, or of a contract to take a lease has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the court has ordered him to pay.

When the purchaser or lessee is in possession of the subject-matter and the court finds that such possession is wrongful, the court may also order him to pay to the vendor or lessor, the rents and profits, if any received by him as such possessor.

In the same case, the court may, by order in the suit in which the decree has been made and not complied with, rescind the contract either so far as regards the party in default, or altogether, as the justice of the case may require,

ILLUSTRATIONS.

to (a)—A sells a field to B, There is a right of way over the field of which A has direct personal knowledge, but which he conceals from B. B is entitled to have the contract rescinded.

to (b)—A, an attorney, induces his client B, a Hindu widow to transfer property to him for the purpose of defrauding B's creditors. Here the parties are not equally in fault, and B is entitled, to have the instrument of transfer rescinded.

NOTES

General—The words in brackets (in writing) were repealed by the Transfer of Property Act, IV of 1892.

Relief is discretionary—As in the case of specific performance, the granting of the relief under Ch. IV is a matter of sound discretion "*Secundum arbitrium boni iudicis*," As laid down in S. 38 the court has the power if it grants relief to impose such terms upon the plaintiff as the justice of the case requires. The words " may be adjudged " in S. 35 should be noted.

The scope of cls. (a), (b) and (c)—Clauses (a) and (b) are general, applying to all contracts, and clause (c) is limited to two kinds, viz., a contract of sale or a contract for a lease; the ground of relief in Cls. (a) and (b) is again different from that in Cl. (c).

Limits on the granting of relief—The relief of rescission granted by a Court of Equity to one whose consent to the agreement is not properly obtained, is subject to two limitations. As *Fry* says there can be no rescission if it is not possible to restore the parties in *status quo ante*, the position in which they would have been if the contract had not been made and if a third person has *bona fide* and for value acquired an interest under the contract. It should be noted that S. 36 is limited to cases where there is rescission on the ground of mistake only.

Scope of Ch. IV—This chapter deals with the rescission of contracts so far as it can be effected by the institution of a suit. S. 35 sets out the three exceptional cases to the general rule that a contract cannot ordinarily be rescinded by one party without the consent of the other; under S. 35 an aggrieved party can have the relief without the consent of the other party, if the case falls under any of the three clauses. A plaintiff coming under this chapter cannot have rescission of a part; he must, if he choose, sue to have the whole contract set aside.¹

What is rescission ?—The relief of rescission is exactly the opposite of specific performance. It is one of the means by which a contract may be discharged. Under the Contract Act, parties get a right to rescind if the case falls under any of the Ss. 19, 39, 53, 55, 67, 153, and by reason of the conduct of the other party in relation to the contract, *e. g.*, when it is voidable.

“Any person interested in a contract”—In 1919 one D executed a sale deed in favour of his near relation S. D died in 1920. In 1923 the representatives of D sued to set aside the deed alleging that S took advantage of the circumstance that D was a man wanting in common sense and associated with vicious persons and that S fraudulently obtained the sale deed without consideration and by misrepresenting to D that he would properly manage the property, and would make a good provision for D's maintenance. It was contended on behalf of S, that the suit being one to set aside a document on the ground of fraud or undue influence, the right to sue did not devolve on his personal representatives, inasmuch as the relief given by sections 19 and 19A of the Indian Contract Act must be confined to the actual party, who had been defrauded or on whom the undue influence had been exercised. It was held that the suit was maintainable under S. 35 as heir was “a person interested

¹ Inderprasad v. Campbell 7 Cal. 474.

in a contract " and as such entitled to get the contract set aside.¹ A suit can be brought by a legal representative to set aside a document which has been induced by fraud or undue influence.

A member of a joint Hindu Family may have the contract entered into by the manager with a third person rescinded if he is defrauded thereby.²

When a contract is "voidable"—To determine this we must turn to the Indian Contract Act, Ss. 19-20. A contract is said to be voidable when it is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other. A contract is sometimes voidable in itself (*ab initio*) or is rendered such by the mistake of the other party thereto. The first class covers cases where consent to the agreement is obtained by coercion, undue influence, fraud or misrepresentation. The second class covers cases falling under Ss. 39, 53, 55, 57, and 153; the third class would cover cases falling under Ss. 20 and 22 Indian Contract Act. A contract that is void is necessarily voidable and so cases of mistake also are covered by this section. It is therefore that the word "voidable" in the section is to be read as including contract that are strictly speaking void because of mistake of fact or law—which is within the province of a court of equity. A contract originally voidable must continue to be so at the time of suit for rescission. The party may elect to rescind by words or conduct. The right to rescind cannot be exercised if in the meantime an innocent third person has acquired an interest in the property or in consequence of the delay the position even of the wrong-doer is affected.

CASES

Burges' case.² A share-holder induced to become so by

1 Shrayan Gopa v. Kashiram 51 Bom. 533.

2 Ravji v. Gangadharbhat 4 Bom. 29.

3 Clough v. L. & N. W. R. Co. L. R. 7 Ex. Ch. 35.

fraud cannot after the Company is wound up, sue for rescission, because the rights of innocent third parties would be affected thereby.¹

Vigers v. Pike.² There can be no rescission if a lessee of mines being fully informed of the circumstances entitling him to set aside the lease goes on working at the mines for profit,

Fauel v. Wright.³ A deed was held void having been signed through a mistaken belief that it was a lease whereas it was in fact a transfer of a mortgage debt.

"What is a terminable contract"—A contract is said to be terminable when it reserves to one or both of the contracting parties a power in certain specified circumstances to rescind the contract. It is a contract which contains a stipulation that in a certain event it may be put an end to ; stipulations for the right to rescind may vary greatly and much turns on their special form ; but the general principle is that they must be acted upon *bona fide*, that the occasion must within the stipulation and the right must be used as soon as it arises, and once waived it cannot be acted upon. The stipulation rendering the contract terminable may be as to the happening of a certain event (conditions subsequent) or as to the non fulfilment of a specific term of the contract (breach of a warranty) ; in the former case the contract is not utterly void ; it can only be rescinded by the party injured thereby : in the latter case, the person who fails to perform his own part cannot rescind, unless having done all that is incumbent on him, he is unable to do it.

A contract that is unlawful—The clause applies only (a) if the contract is unlawful for cases not apparent on the face thereof and (b) if the defendant is more to blame than the plaintiff. The specific relief of rescission is not therefore applicable if the nullity of a contract is apparent upon the

1 15 Ch. D. 511.

2 8 Cl. & F. 562.

3 64 L. T.

face of it or if the parties are in *pari delicto*. In order that contract should be set aside under S. 35 cl. (b), the plaintiff should be shown to have been less to blame in the transaction than the defendant.¹ Cl. (b)* refers to a contract that is apparently operative and really unlawful. In this respect "rescission" differs from the remedy of cancellation given by Ch. V.—the latter being applicable alike to void and voidable instrument whether the nullity is apparent or not; If the direct object of a contract is unlawful the contract would be void under S. 23, Indian Contract Act; with such cases, S. 35 has no concern. It refers, as we have said, to contracts where the direct object may be innocent but is designed to further an illegal purpose. Agreements in which an unlawful purpose taints collateral and innocent transactions are within the province of Cl. (b) to S. 35. But this one condition is not enough; a court of equity follows the rule of common law as to participators in a crime and does not grant relief if the parties are equally in the wrong. *In pari delicto potior est conditio possidentis*. The parties being *in delicto* is not sufficient; they should be in *pari delicto*. Rescission is allowed when the one is wholly innocent as was in *Cowan v. Milbourn*² or he may be only partially guilty—having entered into the contract under extenuating circumstances, as was in *Atkinson v. Danby*.³

Saritri v. Vasudev.⁴ A and B mother and daughter executed a document in favour of C a nephew of A; it purported to divest A and B of the entire property of the Illom of which they were sole proprietors and to vest it in C in consideration of his promise to marry and raise up heirs to the Illom, and to maintain A and B till their death, B sued to rescind and it was held that the object being to defeat the right of escheat of the Government, the same was against public policy and parties being in *pari delicto*, no relief could be given.

1 *Hari v. Naro* 18 Bom. 342. | 3 6 M. & N. 778.

2 L. R. 2 Ex. 230 | 4 9 Mad. 215.

*Cowan v. Milbourn.*¹ A agreed to let a set of rooms to B for delivering lectures ; B intendad to lecture on subjects forbidden by law. A did not know this but on becoming acquainted with the facts, he was allowed to rescind, he being entirely innocent of the unlawful purpose.

*Alkinson v. Danby.*² A, a debtor anxious to compound with his creditors at a certain rate, was forced to give an additional sum to one of the creditors who otherwise refused to consent to the composition ; the debtor was afterwards allowed to rescind the promise to pay the additional sum of that creditor because he was not in *pari delicto* with that creditor.

Default in fulfilling the terms of a decree—

This clause refers to a particular kind of decree, *viz*, one for specific performance of a contract for sale or to take a lease; in that case it is clear that if the purchaser or lessee commit default, the other party should have given relief given unto him. In England the relief is given by an order in the same suit in which the decree was passed ; whereas S. 35 of the Act would seem to require that a separate suit be brought for rescission ; the aggrieved party used not necessarily sue for rescission ; he may ask for and obtain an order in the nature of specific performance appointing a time within which it must be performed, or may ask for rescission—the remedy given by S. 35 Cl. (c). Paras 2 and 3 to Cl. (c) should be read along with this ; para 2 calls upon the purchaser if he is found by the court to be in wrongful possession of the subject matter to pay the vendor the rents and profits received by him. The order for this may be made in the original suit in which the decree was made and not complied with, and the court may also allow rescission in that same suit requiring the vendor to file a fresh suit. This however is an exceptional case ; the general rule is that there should be a separate suit. There are thus 3 stages ; the usual decree for specific performance, the default by the purchaser, and application

1 6 M. & N. 778.

2 L. R. 2 Ex. 230.

for rescission.¹ The English practice seems to be the better one. There is a difference of opinion as to the construction of the word "in the same case." According to the latest decision of the Bombay High Court, the words "in the same case" in the last paragraph of S. 35 refer to Cl. (c). The Court therefore is empowered to make an order in the suit in which a decree has already been made to rescind the contract, instead of putting the opponent to file another suit for rescission.² In a very recent case decided by the same High Court it was held that in any event the case of defaulting vendor (in the other Bombay case³ the purchaser was the defaulter) who has obtained a decree for specific performance is not covered by S. 35 and a new suit for rescission must be filed.

Recently it has been held that S. 35 (c) applies to both the plaintiff-vendor and the defendant-vendor and it enables them to have the contract rescinded in the very action in which the decree for specific performance was made.⁴

In a suit for specific performance of a contract for sale, the decree is in nature of a preliminary decree. Ordinarily Courts avoid passing final decree but leave it to move the Court for an order rescinding contract.⁵

36 *Rescission for mistake*—Rescission of a contract (in writing) cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract has not been made.

1 Sione v. Marsh 35 Ch. D. 188.

2 Kurpal v. Shamrao 25 Bom. L. R. 234.

3 Chaturbhuj v. Kalyanji 29 Bom. L. R. 399.

4 Per Venkatasubba Rao J. in Akshayalingam Pillai v. Avayambalam, mal (1933) 56 Mad. 804.

5 Gocul Prasad v. Fetelal 1945 N. L. J. 500 Shrimurti Parsantaji v. Gulabchand A. I. R; 1943 Nag. 111.

NOTES

Sections 36 and 38 distinguished—Section 36 besides being limited to rescission on the ground of pure mistake, *i. e.*, (not accompanied by any other vitiating element), gives expression to the first limitation to the right of rescission, *viz.*, where it is not possible to restore the parties to *status quo ante*, the other being where a third party has in good faith and value, acquired an interest under the contract; whereas S. 38 lays down the general rule of equity “that he who seeks equity must do equity.” It does this by saying that “the court may require party to whom the relief of rescission is granted to make any compensation to the other which justice may require.” No rule is laid down as to the amount of compensation; it is left in the discretion of the court. The object of both the sections is in a sense to place the parties in the position in which they would have been if the contract had not been made. S. 36 does not differ materially from S. 38: the former seems to imply that a greater degree of exactitude of restoration is required in such cases than in others. If the ground of rescission is “mistake,” the interests of the innocent defendant who has not contributed to it have to be scrupulously guarded by the court. Rescission is always adjudged on equitable terms. If a plaintiff is not allowed rescission under S. 36, he does not lose his other remedy, *e. g.*, damages.¹

*Duke of Sutherland v. Heatcote.*² The plaintiff sued to set aside the lease on the ground of mistake, but relief was refused to him because he was not prepared to give up possession of the lands comprised in the lease. In the case of immovables, *status quo* can be had by restitution of the property, with an account of mesne profits and an allowance for any deterioration.

2. Mistake of law how far ground for rescission—
To start with we have the maxim “*ignorantia juris non*

¹ *Enlarger v. New S. P. Co.* 3 C. 1278.

² L. R. 1892; 1 Ch. 475.

excusat,"—Ignorance of law is no excuse. This rule is strictly construed, would not allow a contract to be rescinded on the ground of any mistake of law; but this strict rule is now to some extent relaxed. As *Story* puts it an act done under a mistake of law is generally valid and obligatory; mere mistake of law unattended with special circumstances will furnish no ground for the interference of a court of equity, for listening too readily to such excuses would be giving great opportunities for the practice of fraud. The tendency of late is to narrow rather than enlarge the operation of exceptions. However though the courts interfere, there is no settled principle laid down for future guidance; the decisions indicate that the relief though apparently on ground of mistake is really on other grounds; that there a mistake of law is not foundation of relief but is only the medium of proof to establish some other proper ground of relief. *e. g.*, undue influence, imposition of mental weakness, etc. With this view judges have attempted to put limitations on the maxim in a course of decided cases and so we have now the modern rule that a mistake of foreign law is equal to mistake of fact; and so is a mistake of private rights a mistake of fact. The words "ignorance of law" are construed to mean only ignorance of a general rule of law of the realm, not ignorance of a right depending on mixed questions of law and fact, or on the true consideration of a particular instrument, or of particular private rights or of foreign law.¹ Private right is a matter of fact but may be the result also of a matter of law; even then the court interferes. The distinction between a mistake of fact and that of law seems, to be one of policy rather than of principle. The test is upon what false assumption was the contract directly and immediately founded? If one of law, there will be no relief, if one of fact though that fact may be the result of a matter of law there will be relief. Where a mistake of fact is a ground for relief, it is not the less so because the person who has made the mistake had the means of knowledge.²

1 *Cooper v. Philip*; 5 L. R. 1 H. L. 149; *Earl Beauchamp v. Winn*, L. R. 6 H. 223; *Bingham v. Bingham*, 1 Ves. 126.

2 *Wilmot v. Barber* 15 Ch. D. 66.

37 Alternative prayer for rescission in suit for specific performance—A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the court if refuses to enforce the contract specifically, may direct it to be rescinded and deliver up accordingly.

NOTES

Operation of S. 37—The provision made in Section 37 is in accordance with English practice; it must be remembered that it is not allowable to set up two inconsistent states of fact and to ask in the alternative or totally different forms of relief on wholly inconsistent ground. The alternative relief claimed as under S. 37 must be based on the same state of facts as the prayer for specific performance though different conclusions as to law.¹

*Cowly v. Poole.*² An action to set aside a transaction for fraud or in the alternative for specific performance of a compromise is not maintainable; this reverse of mode seeking relief is not permissible; but a person may sue for specific performance and urge that if the court is against him on that ground, the contract may be wholly rescinded.

38. Court may require party rescinding to do equity—On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

¹ *Hagkins v. Lambert* 1 J. H. 459.

² 1 H. & M. 20.

NOTES

Compensation—This section leaves it to the court to fix the compensation according to the justice of the case; the nature and extent of the right of the defendant to compensation in case of rescission is discussed in England in *Newbigging v. Adam*.¹ This section is not concerned with the case of a plaintiff who seeks rescission and also damages; it refers to the special case where a defendant in a decree for rescission of a contract is entitled to compensation. No question as to compensation can arise under S. 33, where an action for rescission is dismissed. Where both parties are innocent, compensation has to be considerable; but where the rescission is due to the misconduct of the defendant, the latter is not entitled to much consideration at the hands of the court. S. 38 is a supplement to S. 36. Both there read together emphasize the rule from the point of view of the person against whom rescission is adjudged that there can be no rescission where there is no possibility of restoration in fact or equity—S. 36 requiring as to condition of rescission his substantial restoration—which S. 38 suggests that this may in some case be effected by pecuniary compensation.

(See notes to S. 36),

CHAPTER V.

OF THE CANCELLATION INSTRUMENTS.

39. *When cancellation may be ordered*—Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion so adjudge it and order it to be delivered up and cancelled.

¹ H. L. 13 A. C. 308.

If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

ILLUSTRATIONS

(a) A, the owner of a ship by fraudulently representing her to be seaworthy., induces B, an underwriter, to insure her. B may obtain the cancellation of the policy.

(b) A conveys land to B, who bequeaths it to C and dies. There upon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.

(c) A, representing that the tenants on his land were all at will, sells it to B, and conveys to him by an instrument, dated the 1st January, 1877. Soon after that day, A fraudulently grants to C a lease of part of the lands, dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act. B may obtain the cancellation of this lease.

(d) A agrees to sell and deliver a ship to B, to be paid for by B's acceptance of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn and accepted, but the ship is not delivered according to the agreement. A sues B on one of the bills, B may obtain the cancellation of all the bills.

Quia timet—*Nature of the relief*—The jurisdiction of a court of equity to order cancellation and delivery of

agreements, deeds; &c., is based upon the administration of a protective or preventive justice. The court will interfere to prevent multiplicity of suit, or irreparable mischief before it actually takes place on the principle, of *quia timet*. "The party is relieved upon the principle, as it is technically called *quia timet*; that is for fear that such agreement, securities, deeds or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or that they may now throw a cloud of suspicion over his title or interest," The relief as to cancellation of an instrument under this Section is founded upon the administration of the protective justice. The relief in question is granted before any violation of the plaintiff's rights takes place; though no actual injury has been sustained, the court interferes because it is apprehended from the peculiar relation between the parties."²

Relief is discretionary—A party is not entitled to this relief as a matter of right. Its exercise is a matter of sound judicial discretion "to be exercised by the court according to its own notion of what is reasonable and proper under all the circumstances of the particular case. The court has even when it grants the relief, the power to put the plaintiff upon terms; *i. e.*, the relief can be granted on certain conditions if it thinks necessary to do equity to that other: The court has to proceed on the principle.—"*He who seeks equity must do equity.*"

Conditions for the relief—In order that S. 39 may apply the plaintiff must make out—

(i) that the instrument is *void or voidable* as against the plaintiff—

1 See Story on equity, Ss. 694, 701, 710, 730.

2 Chhaganlal V. Dhondur 27 Bom. 607, Jeka Dula V. Bai Tivi. 39 Bom. L. R. 1072.

(ii) that he has *reasonable apprehension* of injury from the instrument if it is left outstanding—

(iii) that the threatened injury is *serious*—

(iv) that the court ought under the circumstances of the case in the exercise of its discretion to adjudge the instrument void or voidable and order it to be delivered up and cancelled.¹

Interference on appeal—The exercise of discretion by a trial court under this section is not to be interfered with in appeal except on strong grounds that the plaintiff has failed to show grounds for any reasonable apprehension of serious injury.²

Object of the suit—The express wording of S. 39 indicates that suits under the section have to be confined to the object mentioned. *viz.*, to have the instrument adjudged void or voidable and to have it delivered up and cancelled. This section will not apply if the real object of the suit is to obtain a declaration under S. 42 and not cancellation.³

Ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which, if genuine, he has no title.⁴

It has been recently held in Calcutta case that a suit for cancellation of an instrument of transfer of land by a person who has transferred his interests in land to another before suit is maintainable.⁵

1 Per Jenkins C. J. in Valimohamad v. Dattu 25 Bom. 10, 18-19.

2 Bhamar Rai (1891) A. W. N. 147.

3 Jajba Pandey v. Naha rabib. 5 All. 3-2.

4 Shankarlal v. Saruplal 34 All. 140.

5 Radh. Sunder Royysakti pada Roy A. I. R. 1936 Cal. 714. Balakram v. Ganga Bisan. A. I. R. 1940 Pat. 133. Katprasad v. Chandra Mal. A. I. R. 1934 All. 1071. Jagat Singh v. Behari Lal A. I. R. 1942 All. 104.

Rescission and cancellation : Difference between Chapters 4 and 5—The relief given under Ch. 4 is where the contract is either voidable only or its unlawfulness or nullity is not apparent on its face ; but Ch. 5 includes void as well as voidable instruments, whether the nullity be apparent or not with this limitation that there must be reasonable apprehension of serious injury. Again Chapter 4 speaks of rescission of contracts only, whereas under Ch. 5, any instrument whether it be, a contract or a will or settlement, or any other, can be cancelled. S. 39 is wide enough ; any one not even a party to an agreement, can sue for cancellation provided the instrument is voidable against him.¹ Relief is always given if the illegality or nullity is non apparent : “ if an instrument is void and ought not to be used, it is against conscience for the party holding it to retain it since he can only retain it for a sinister purpose.” But where the illegality is apparent, there can be rarely any reasonable fear of injury ; and so courts require clear evidence justifying apprehension ; the same principle applies to time expired documents which, originally valid, have by subsequent events become *functus officio* and void. A person can not come under S. 39 if he has no interest in the subject-matter of the instrument. Section 36 applies if an instrument is obtained by undue influence.²

There must be reasonable apprehension—This is a question of fact ; whether there is reasonable apprehension or not is question depending upon the illegality or unlawfulness of the instrument that appears on the face of it ; as we have seen above, the court interferes when it is not apparent ; but if it is, ordinarily it does not interfere for in that case “ there is no danger that the lapse of time may deprive the plaintiff of his full means of defence nor can it be said that such a paper would throw a cloud over his

¹ Ishwar v. Dewar 27 Bom. 146.

² Jhuna v. Becuarain 9 Al. 439.

³ Mamusingh v. Umadat Ponde 12 All. 523.

title or right or diminish its security, nor is it capable of being used as a means of vexatious litigations of serious injury." In every case there may be apprehension; but to bring the case under S. 39 the same must be reasonable.¹

The non-payment of inadequacy of consideration of a sale deed is not a sufficient ground for cancellation.²

Instrument—A person can sue for cancellation of an alleged forged receipt purporting to be in discharge of a mortgage debt due by him to the plaintiff. A receipt is an instrument.³

The effect of the declaration in a suit under S. 39 of the Specific Relief Act that the instrument is void or voidable is not to include the relief that the instrument should be delivered up and cancelled. It is necessary that such relief if sought, shall be expressly prayed for.⁴

Registration—In *Mohima Chunder v. Juglukishore*,⁵ this section was held to contemplate and provide for a suit to have a document cancelled and declared void when the defendant in whose favour it was said to have been executed obtained an order from the District Registrar under the Registration Act for its Registration, although the plaintiff had appeared before the District Registrar and the Sub-Registrar and denied the genuineness of the document alleging it to be a forgery.

Illustrations—Illustrations (a) and (b) are instances of contracts between the parties to the suit for cancellation; whereas illustrations (c) and (d) are examples of instruments

1 *Kotracaspa v. Chevvispa* 23 Bom. 375.

Radha Sunder v. Sakti Pada A. I. R. 1936 Cal. 714. *Jekū Dula v. Bai Jivi* 39 Bom. L. R. 1072.

2 *Kilara v. Kolaya* 13 M. L. T. 521.

3 *Vencata v. Srinivasa* 7 M. L. T. 270.

4 *Radhasundari Ray v. Saktipada Ray* (1935) 62. Cal. 479; See also 56 Mad. L. J. 394 which is dissented from and 54 All 812.

Followed in A. I. R. 1940 Pat. 133 (*Balakram v. Ganpa Bisan*.)

5 7 Cal. 736.

other than contracts, and in neither is the plaintiff an apparent party to the instrument,

*Chagandas v. Dhandu.*¹ On the 16th March 1899 the firm of C, brought a suit against D and one Babu to recover a sum due on a bond passed by them to the firm; the defence was that bond was void being passed for a balance due on a wager; while this suit was pending on the 13th June 1899 D brought a suit to have the above bond cancelled under S. 39, Specific Relief Act. The sub-Judge decided both the suits together, he dismissed the first suit and allowed the second. It was held by the High Court that no relief should have been granted in the second suit for there could be no fear that the plaintiff would suffer serious injury if he did not bring that suit; he had already raised that plea in the first suit.

40 *What instruments may be partially cancelled.*—When an instrument is evidence of different rights or of different obligations, the court may, in a proper case, cancel it in part and allow it to stand for residue.

ILLUSTRATION

A draws a bill on B who indorses it to C, by whom it appears to be indorsed to D who indorsed it to E, C's indorsement is forged. C is entitled to have such indorsement cancelled leaving the bill to stand in other respects.

Scope of S. 40—Ordinarily the document is cancelled as a whole if it is void; but it is often that different rights are evidenced thereby; in such cases equity requires that there should be cancellation only of a part that is void or voidable. But then a ground for cancellation must not be combined with a totally inconsistent charge as was done in *Iyapa v.*

Ramalaxmana,¹ where A whose name appeared in the sale deed as an executant having sued for cancellation, alleging forgery, and that if it was not forgery, the execution of the deed has been obtained by fraud and that it was void for want of consideration—the suit was held not maintainable. But where the defendant got hold of the original document from the plaintiff's custody and fraudulently endorsed the receipt of payment of Rs. 1,200 on the mortgage deed, a suit for the cancellation of the endorsement fraudulently put upon the mortgage-deed by the defendant was held maintainable. The endorsement itself was regarded as a document.²

Inderprasad v. Campbell,³ A agreed to cultivate indigo for B during a certain number of years on certain lands situated in different villages in respect to a portion of which lands, A was a sub-tenant only. A lost possession of this portion because his landlord not having paid his rent was ejected. A sued to have so much of the contract as related to those lands cancelled because performance was impossible through no neglect of his. It was held that he could sue under S. 40 because the instrument related to cultivating in different villages and was therefore evidence of different rights and obligation.

41 *Power to require party for whom instrument is cancelled to make compensation*—On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

NOTES.

Power of court to order compensation—It does not follow that because a party succeeds in securing a verdict

1 13 Mad. 549.

39 All. 103.

2 Ram Chandar V. Gangasaran

3 7 Cal. 474.

for cancellation he is relieved of all his obligations under the transaction ; the transaction may no doubt be indefensible but still some consideration may have passed from the other side, and there is an equitable right to compensation. It is therefore that this section empowers the court on adjudging cancellation to call upon the plaintiff to make compensation to the defendant or put the plaintiff upon terms as equity requires.

CASES

Mason v. Gardiner,¹ In usury cases the borrower may be called upon to pay the debt fairly due.

*Halrook v. Sharpey*²—When annuity securities are cancelled on the ground of want of registration, the court has to direct an account of receipts and payments on each side and require the just balance to be paid by the proper party.

*Rajah Ajitsingh v. Bijaisingh*³—On adjudging cancellation of a hypothecation and sale deed on the ground that the grantor's manager and lender colluded, the court ordered that the plaintiff should repay the sums actually paid to the manager or borrowed by him in the course of a prudent management of the estate.

Advances to a minor—Where money has been advanced to an infant on mortgage with full knowledge of his infancy court can in the exercise of discretion conferred on it by Ss. 33 and 41 refuse to order its return by the infant to the other party.⁴ In setting aside a sale made on behalf of a minor by an unauthorised person, the court may under this section make it a condition that the minor should refund the amount by which his estate and himself were benefited,⁵ but the court will award compensation only in a proper case. Where the plaintiff sued to obtain declaration that the

¹ 4 Bro. C. C. 436.

² 19 Ves. 131.

³ L. R. 11 L. A. 211.

⁴ *Mohri Bibi v. Dhurmo Das*, 30 Cal. 539.

⁵ *Dattharam v. Vinayak* 28 Bom. 18; *Limbaji Ravji* 49 Bom. 576
Followed in (1926) 7 Lah. 35,

sale-deed passed by her to her deceased husband's brother was not valid as having been executed during her minority and to recover possession of the property and where defendant contended that the plaintiff was estopped because she represented her-self as being a major where she must have known that she was a minor, and questions were raised as to whether the plaintiff was estopped on account of the representation made by her and (2) whether the court should have directed the plaintiff to restore the consideration money, it was held that the plaintiff was not estopped, there being evidence that the defendant was not deceived by what she told him in as much as he had made inquiries about plaintiff's age from the plaintiff's father and from other sources and that there was no equity in favour of the defendant to direct the plaintiff to restore the consideration money.¹ Where a Mahomedan minor brought a suit for declaration that sale by the defacto guardian (mother) was void, and for possession of properties from alienee with mesne profits, held plaintiff had obtained a solid benefit by a transaction carried out bonafide for consideration; he should not be allowed both to approbate and reprobate i. e. to get benefit of transaction and at the time to treat document as void.²

Where A, a minor falsely represents to B that he is a major, when in fact he is a minor and thus induces B to buy his land, and B believing in the representation pays for the land, A can have the sale set aside on the ground of minority at the time of the sale, only on condition that he repays the purchase money.³

But where innocent purchaser or alienee has advanced money to minor without knowledge of the minority, or on false representation by minor, an order for refund can properly be made against minor.⁴

1 *Gurushdidaswamy v. Parawa* 44 Bom. P. 175.

2 *Rahinabibi V. Amatul Munon Beg* A. I. R. 1936 Mad. 140

3 *T. P. Apoaswami Ayyangar v. Narayan Swami Ayyar* (1931) 54 Mad 112. See also *Harnath Kunwar v. Indar Bahadur Singh* 45 All. 173 (P. C.); *Khan Gul v. Lakha Singh* (1928) 9 Lah. 701 (P. B.);

4 *Hanumat Rao V. Sitarammya* A.I.R. 1939 Mad 106; *Abdul Subhan Khan v. Nasrat Ali, Khan* A.I.R. 1937 Oudh. 170

CHAPTER VI

OF DECLARATORY DECREES.

42 Discretion of Court as to declaration of status or right—Any person entitled to any legal character, or any right as to property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief.

Bar to such declaration—Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation—A trustee of property is “ a person interested to deny ” a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

ILLUSTRATIONS.

(a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way, across the land. A may sue for a declaration that they are not entitled to the right so claimed.

(b) A bequeaths his property to B, C and D, to be equally divided amongst all and each of them if living at the time of his death, then amongst their surviving children. No such children are in existence. In suit against A's executor the court may declare wheather B, C and D, took the property absoltely or only for their lives and it may also declare the interests of the children before their rights are vested.

(c) A covenants that if he should at any time be entitled to property exceeding one lack of rupees, he will settle it upon certain trusts. Before any such property accrues or any persons entitled under the trusts are ascertained he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.

(d) A alienates to B property in which A has merely a life interest. The alienation is invalid as against C who is entitled as reversioner. The court may, in a suit by C against A and B, declare that C is ~~so~~ entitled.

(e) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her may in a suit against the alienee, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(f) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son, may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(g) A is in possession of certain property. B alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.

(h) A bequeaths property to B for his life, with remainder to B's wife and her children if any by B, but if B die without any wife or children, to C. B has a putative wife **D** and children, but C denies that B and D were ever lawfully married. D and her children may in B's lifetime institute a suit against C and obtain therein declaration that they are truly the wife and children of B.

NOTES

Origin and nature of declaratory relief—In England formerly it was the practice of Equity court to preface their decrees by declaration of rights or title or of matters of fact introductory to the relief about to be given ; but this declaration was not made except as introductory to the relief ; so also in Scotland there used to be a remedy a "*declarator*"—a declaration of right apart from all further relief. It referred to action whereby it was sought to have some right of property or of status or other right judicially ascertained and declared ; as *Collett* puts it, such actions are designed for the purpose of making that clear which is at present doubtful, and which it is necessary to make clear. In such actions some right is craved to be declared in favour of pursuer, but nothing is sought to be paid or performed by the defender. Decrees upon such actions confer no new right ; they only declare what was the pursuer's right before.

History—The history of decrees merely declaratory is interesting. Such decrees are an innovation and they first obtained authoritative sanction in England by S. 50 of Chancery Procedure Act. 1852. Before this it was not the practice of the Court in ordinary suits to make declaration of right except as introductory to relief which it proceeded to administer.¹ Seven years later, India followed suit with S. 15 of the Code of Civil Procedure, 1859, when it was enacted that : "No suit shall be open to objection on the ground that merely declaratory decree order is sought thereby and it shall be lawful for the civil Courts to make binding declarations of right without granting consequential relief." This section was however repealed by Specific Relief Act of 1877 and is substituted by S. 42 which is now the only provision of law under which a suit for a declaratory decree can be

1 *Deokali Koer v. Kedar Nath* 39 Cal. 708

brought in India.¹ The old enactment was very narrow in its scope : The general principle laid down by the Privy Council in the old cases was that a declaratory decree ought not to be made unless there is a right to some consequential relief which, if asked for, might have been given by the Court or unless in certain circumstances a declaration of right is required as a step to relief in some other court.² Compared with the provision of the present S. 42 of Specific Relief act, the principle was too narrow as a general statement of the right to this form of relief.

Object of the section—The object of S. 42 is to express in definite terms the kind of cases in which the specific relief of a declaration of right, apart from all further relief may be granted. At the same time care has been taken to avoid a multiplicity of suits and to prevent a person getting a declaration of right in one suit, and immediately after, the remedy already available in the other. This is clear from the proviso of this section ; the proviso refers to the status of the plaintiff at the time of filing the suit.³ The Legislature intended by this section that the court might grant to a plaintiff the relief granted by a court chancery where no relief at common law was available. It must be remembered that it is not the intention of the Legislature to lay it down as a rule that any one who claims any interest in property present or future ought to be allowed to ask the court to give him an opinion on his title.⁴ S. 42 merely refers to declarations as against the parties to the suit, not to mere declarations of abstract right or bare declarations of trust exclusive of any practical equity. S. 42 does not sanction every kind of declaration but only a declaration that the plaintiff is entitled to legal character or to any right as to any property.⁵ But according to Madras

1 *Kushamma v. Kunhunni* 16 Mad. 140.

2 *Sheosingh v. Dakho* L. R. 5 L. A. 87 ; 1 All. 705 ; *Kattamu Nakhair v. Dorsinga* 2 L. A. 169 ; 15 B. L. R. 83.

3. *Govinda v. Cerumudevi* 13 Mad. 136.

4. *Bhugendra v. Trigunathu* 8 Cal. 761.

5. *Must Deokali Kuar* 39 Cal. 704.

High Court decision mentioned below a suit for mere declaration of right may not be within purview of Section 42, yet it may be maintainable. It is followed by other High Courts also.¹ This section does not contemplate a suit for a declaration that a valid personal contract subsists between the plaintiff and the defendant, as it is not a suit for a declaration of title to a legal character or a right to property.

A suit for the declaration of mere abstract right cannot be maintained. There must be some infringement actual or threatened of the plaintiff's rights; the plaintiff must allege and prove a denial of his right before the plaint is filed; the cause of action must be antecedent to the suit and not subsequent.

Whether s. 42 is exhaustive—According to the highest Judicial authority, the court's power to make a declaration without more is derived from S. 42 of the Specific Relief Act and regard must therefore be had to its precise terms.² The Bombay High Court has also held that the court has no power to make declarations except in so far as such power is expressly conferred by statute.³ The view of the Allahbad High Court is that the British Indian Courts have no general power to make a declaratory decree outside the limits formulated by S. 42 of the Specific Relief Act.⁴ It was, however, been held by the Madras High Court that this section is not intended to be exhaustive as regards the circumstances under which

1. *Ramchandra v. Secretary of State for India* 39 Mad. 808.
Shri Kishan Chandra v. Mahabir Prasad 55 Mad. 791.
Secretary of State v. Subba Rao 56 All. 749.
Zamindar of Khallikote v. Berro Piliat 59 Mad. 825.
Swayam prabhai v. Muthu Krishna A. I. R. 1942 Mad. 362.
Rani Ganj Coal Association v. Tata Iron and Steel Co. 43 Bom. L. R. 403.
Shripad Rao v. Shanker Rao 31 Bom. L. R. 207.
2. *Sheoparsan Singh v. Rannardan Singh* 43 Cal. 694-704 ; 43 I. A. 91-97.
3. *Bai Vaktuba v. Agarsingji* 34 Bom. 676, 680.
4. *Bholanath v. Lachmi Narain* (1931) 53 All. 321.

declaratory suits can be maintained.¹ Thus a suit for a declaration that an order debarring one from acting as Vakil for another in village courts is void is maintainable though it may not be covered by S. 42 of Specific Relief Act.² The correct view, it is submitted, is that S. 42 is exhaustive and the courts have no power to pass declaratory decrees independently of that section.³ At all events, the proviso to Section 42 is paramount and its effect cannot be avoided.⁴

Essentials of the relief—A perusal of the section indicates that three essentials must be satisfied to get a decree for declaration and that decree would even then relate either—to some legal character (legal status, *e. g.*, legitimacy marriage, divorce, adoption, &c., as in illus. (f), (h) or to some right to property. Collett mentions the 3 requirements of a suit for—declaratory decree as under :

(i) there must be a present existing interest, however distant the possibility of its coming into actual possession and enjoyment may be. A mere contingency however proximate and valuable, if by virtue of it, there is no present estate or interest will not suffice, as in the case of the heir of a lunatic;

(ii) there must be some present danger or detriment to such interest to be averted by the declaration, *i. e.*, the declaration must not have been sought on purely speculative grounds; there must have been some denial of the right; and

(iii) A man who is at the time entitled, if at all, to an executory decree, cannot seek only a declaratory decree.

Even if the above elements are satisfied it is *discretionary* with the Court to grant the relief; it cannot be claim-

1. Ramkrishna v. Narayan 39 Mad. 80.

2. Ramchandra v. The Secretary of State for India 39 Mad. 808.

3. See Pollock & Mulla's Contract Act, p. 847. 6th edition.

4. Raja Udani Raj Singh v. Secaetary of State. 45 All. 553.

Tulsidas v. Shivdat 9 Lah. 167.

Fariduddin Ahmed v. Murtaza Ali khan 11 Luck. 486 (1935).

ed as a matter of right. A court does not make a declaration if all the parties are not joined.¹ In a suit for specific performance of a contract, some of plaintiffs die, & no one is added as their representative, suit abates and contract cannot be specifically enforced.² It must be noted that the proviso to the section does not empower a court to dismiss a suit merely because plaintiff being able to seek further relief fails to do so; in that case, all that the court do, is to refuse to make declaration.³

The court will in the exercise of its discretion refuse to give a declaratory decree if the appropriate remedy exists elsewhere⁴ or where the real object of the suit is not a declaratory decree but to obtain an opinion on title or is a cloak to conceal the real relief.

A declaratory suit cannot lie in respect of rights arising out of a contract.⁴ It has been stated in the beginning that because case fulfils all 3 conditions laid down in Section 42. Court is not bound to grant declaratory decree;—

(1) A reversioner in whose favour a surrender was made cannot ask for a declaration that surrender is void. *Jeka Dula V Bai Jivi*. 39 Bom. L. R. 1072,

(2) Where the case is of such a character that decree if passed, would be meaningless. *Biswan Saran V Mugtala Hussain* (1941) 16 Luck 742 *Mahomed Israt V Patna city Municipality* 21 Pat. 481 1942.

The Federal Court has not decided finally whether a suit that a particular statute being ultra vires lies against Government under this Section. *Thakur Jaganath Baksh Vs. United province* A. I. R. 1943 F. C. at 35.

1 *Maharaja of Benares* 27 All. 136.

2 *Aziz khan v. Bholanath*, A. I. R. 1945 All 21.

3 *Kunjabehari v. Keshavlal* 28 Bom. 537; *Pharasram v. Bhimbai* 5 Bom. L. R. 195.

4 *Kunhamad v. Kathi I*; Mud 167; *Markuar v. Tarasinga* 18 All. 583.

5 *Shripatrao v. Shankarrao*, 32 Bom. L. R. 207.

The plaintiff must be entitled to any legal character or to any right to any property.—

This is the first requirement of a suit for a declaratory decree. It is for the plaintiff to show by definite proof that he is entitled to either of the two.

CASES.

In *Maina v. Brijmohan*.² The suit was brought for a decree declaratory of the plaintiffs' title to be mutwalis and managers of properties from ancient times connected with religious observances, viz., a ghat upon the river Jumna; and the suit was dismissed by the Privy Council because the plaintiffs had not definitely proved their rights.

In *Wajidali v. Dianutula*.³ A Mahomedan brought a suit against a person in possession of certain property for a declaration that the property was wakf; he did not allege himself to be interested in the property further than as being a Mahomedan. He stated as his cause of action that the defendant had in a former suit between the same parties filed a written statement denying that the property was wakf; the suit was held by *Petheram C. J.* to be unmaintainable because the plaintiff did not assert any right to property nor had he any legal character denied by any one; his character as a Mahomedan was not denied by the defendant. The word legal character includes right of franchise a right to stand as a candidate in election.⁴

Any right to any property—Those that have

1 *Sheoparsan Singh v. Ramnandan Prasad Singh* 43 Cal. 694; *Deokali Koer v. Kedar Nath* 39 Cal. 704; 71 Mad. L. J. 611 *Saiyad Pitchai Rowther V Devji Rao*; *Haji Mahammad V Province of Bengal* 1942 1 Cal 211; *Naran Chandra Dalpat v Sidh Nathsingh* 1940 2 Cal 443; *Iatrudhan Prasad V Udaw Pratap A. I. R.* 1940 Pat. 502; *Nandlal Khairatlal A. I. R.* 1938 Lah. 574.

2 12 All. 587.

3 8 All. 31.

4 A. I. R. 1945 Lah. 85 *Satnar Chin v Hanuman Prasad and others*.

read elementary jurisprudence are aware that rights as to property are in regard to the enjoyment of the property, either present or future, and in regard to real property are known as estates in possession or estates of present enjoyment and estates in expectancy or rights of future enjoyment of lands (Where the actual enjoyment is postponed until the lapse of a specified time or the happening of a specified event). Both kinds of above rights are *present* rights, *i. e.*, the one is a present right to present enjoyments and possession, the other is a present right to future enjoyment; both these are within the scope of S. 42, but this present right to future enjoyment has for the purpose of this section to be distinguished from a mere chance or possibility of rights, inasmuch as the former is a distinct and definite interest known to the law capable of alienation by the appropriate remedies and devolving at the death of the person entitled upon his representatives, which the latter is not. The former, *i. e.*, existing rights to the future enjoyments of property are known as reversions and remainders; these can be vindicated by means of a declaratory decree; the terms " reversion " and " remainder " are explained in notes to S. 23. To put briefly a " reversion " is an estate of future enjoyment arising not by act of parties but by operation of law—*i. e.*, not expressly created by, but resulting from, the alienation of a particular estate, whereas a " remainder " is the fraction of interest created by express words at the same time as the particular estate and is so limited as to come into enjoyment or possession as soon as the particular estate comes to an end. The " remainder " may be *vested or contingent*. If the enjoyment is postponed till the lapse of a certain specified time or the happening of some event, which may be certain to happen, it is said to be vested remainder ; if it is postponed till the happening of an event which is not certain to happen it is said to be contingent.

A contingent remainder is a present right to future

enjoyment and is uncertain. It is indeed a chance of actual enjoyment, but is not quite a mere chance of a future right; it is a right recognized by law. A contingent remainder is not a contingent right, such a right is within the purview of S. 42, though in one case the Calcutta High Court held the contrary; this is clear from illustrations² and³ this section; they relate to persons presumptively entitled. for cases, see *infra*—notes on illustration.

A suit can lie for a declaration that a minor boy is not the plaintiff's son.

A plaintiff can sue for a mere declaration if rent decrees are obtained by a defendant against the plaintiff's tenants and he has thus thrown a cloud on his title.

A suit for a declaration cannot be merely to set aside a deed which is merely of evidentially value,

A dismissed Government servant is not entitled to a declaration that his dismissal is in contravention of the rules for it cannot lead up to any consequential relief against the crown which the court is competent to grant.

A right to attach a particular property is a right as to property (*Jamnabai v. Dattatraya* 38 Bom. L. R. 251.) There is nothing in sec 42 which bars a suit for declaration that a certain sale is void A. I. R. 1936 Pat. 572. Suit for declaration of Legitimacy is maintainable under sec 42. Legal character includes legitimacy. A. I. R. 1945. Lah. 266 (F. B.).

Haji Abdul Karim v. Mst. Sarja Begum (A. I. R. 1936 P. 23 overruled).

The defendant must have denied or be interested in denying the plaintiff's status or right—

¹ *Gangaya v. Mahalaxmi* 10 Mad 90; *Bombay Burmah Trading Co. v. Yorks Smith* 17 Bom. 197 ; *Greeman v. Mohanlal* 8 Cal. 12.

² *Bai Snri Vacuva y. Aggrsingji* 34 Bom. 676.

³ *Satish Chunder* 14 C. W. N. 516.

This is the second requirement of a suit for a declaration; in the absence of proof that the defendant is denying the plaintiff's legal character or right to any property there can be no cause of action. It is not necessary to prove actual denial; it is enough if the defendant is interested in denying it.¹

CASES

In *Bhupalram v. Luchma Kuar*,² A Hindu widow who had succeeded to her husband's estate, made a gift thereof to her daughter who was entitled to inherit on the widow's death; the reversioners sued to impeach the gift but the suit was dismissed on the ground that there was no denial of the reversioner's right—the effect of the gift was only to accelerate the latter's succession and put her by anticipation in possession of the estate.³

In *Secretary of State v. Kalidas*,⁴ Where an order under S. 133, Cr. P. Code was made for the removal of a certainotta standing in front of K's shop as being an obstruction, K sued for a declaration that the land was his own and not that of the Government; the action was allowed for the defendant was interested to deny K's title to the land; it was held that since the public roads were vested in Government by Bombay Act of 1879, the plaintiff need not wait till the Government has taken actual possession of the land.

Where the plaintiff's trustees of a Hindu temple, brought a suit for a declaration under this section that they were entitled to play music while going in procession passed a Mahomedan mosque situated in a public street, it was held that such a suit would not lie, inasmuch as playing music was not one of the natural uses to which public street ought to be put.

1. *Secretary of State v. Kalidas* 17 Bom. 293.

2. 11 All. 253.

3. On the same ground, the suit was dismissed in *Wajidali v. Dainutoli* 8 All. 30.

4. 17 Bom. 293.

63 Cal. 1038 *Lorinkpara Tea. Co. v. Gopal pura Tea. Co.*

Per Heaton J.—The right to use a street as a thoroughfare is a right which a court might properly declare but the right to pass along a street playing music, is not a right which the courts ought to recognise in that sense.¹

The widow of a Hindu who lived in union with his family having adopted a son to her deceased husband, her unmarried daughter sued to have it declared under this section that the adoption was invalid. It was held that the plaintiff was not entitled to maintain the suit under this section as she was neither entitled to any legal character nor had she any right to any property, her only right being to be maintained out of the family property and to have her marriage expenses paid from it.²

Under section 42, Right may be existing. It need not be vested right in Plaintiff. A person having a contingent right may sue for a declaratory decree on cause of action. A court in exercise of its discretion may refuse to make a declaration if it considers that right is too remote and declaration granted would be ineffective or useless. Court has got to exercise its discretion of judicial principles.³

The Granting of relief is descretionary with the Court—Even if the above requirements are satisfied a declaratory decree is not a matter of right with the plaintiff. It is descretionary with the court ; of course as has been often observed the court has to exercise its discretion not arbitrarily nor capriciously but like a prudent man ; and it is capable of correction by court of appeal. The words in the section are very clear and they only repeat the practice pravailing in English Chancery court where too discretion is required to be exercised with great caution.⁴ A court does not exercise its

1. Venkatesh v. Abdul Kadir 42 Bom. p. 438=20 Bam. L. R. p. 667.

2. Ganesh v. Rangnath 20 Bom. L. R. p. 413.

3. Tarak Chandren and others v. Anukul Chandra Mukerjee A. I. R. 1946 Cal. 118.

4. Bhugendra v. Trigunath 8 Cal. 761.

discretion in favour of the plaintiff if there is any attempt to evade the stamp law or to eject parties in possession under a colour of a mere declaratory title. On these grounds a declaratory decree has been refused.¹ It is for the court in the exercise of its discretion to decide whether the plaintiff is competent to sue. An improper exercise of discretion by the lower court is not in itself a ground for reversing the decree of the lower court except when it affects the jurisdiction of the court or the merits of the case.² Even the Privy Council is again a superior tribunal interfering lightly in the case of exercise of discretion by the lower court.³ If it interferes it must state its reasons for so doing.⁴ In granting a declaratory decree where no consequential relief is prayed the court has to exercise its discretion with still greater caution.

Proviso—The effect of the proviso to S. 42 of Specific Relief Act is that the Court shall not make a declaration in the events specified in the proviso, not that the court shall not grant the relief that is prayed. Where the plaintiffs were entitled to claim possession in addition to the reliefs sought, it was held that the suit was wrongly dismissed because the plaintiffs had omitted to claim further relief⁵. The proviso is applicable only to such relief as is appropriate and consequent on the right asserted and not where the relief is merely auxiliary⁶.

A court will not throw out a suit as barred by the proviso unless it is satisfied beyond all doubt that plaintiff ought to seek, further relief and yet he has claimed nothing beyond a declaration of title.⁷

1. *Vejjidali v. Dianutua* 8 All 31 and in *Ganpatgir*, 3 Bom. 280; *Chocklinga*, 1 Mad. 40.
2. *Muhamad v. Khudabay* 9 All. 622.
3. *Ramchandra v. Balmukund* 29 Bom. 73.
4. *Kalikison v. Qulamali* 13 Cal. 3.
5. *Sakharam v. The Secretary of state for India* 28 Bom. 332.
6. *Amin Chand* 19 I. C. 219.
7. *Aisa Sidha* 17 C. L. J. 20. *Venkatachalam Chettiar v. Province of Madras*. (1 46) M. L. I. 111. *Mohammed Roza Khan v. Bebi Said Begum* 1946 A. W. R; 9.

The proviso has no application to suits instituted under (O 21, r. 63). C. P. Code.¹

Further consequential relief—The word relief in proviso to Sec. 42 connotes something which is needed by a person seeking relief. If further relief is necessary to that effect which plaintiff needs and seeks in court, then he is not entitled to make declaration. A suit for declaration that certain property is property of joint family consisting of plaintiff and defendants and that plaintiff has a share in it, and he is in possession, defendant alleging that it is not joint family property. Suit is not barred. Relief of partition is not further relief ².

The proviso to S. 42 operates as a check upon the granting of declaratory decrees; the courts are expressly warned not to make any declaration where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. Where the plaintiff omits to seek further relief and applies for an amendment of the plaint in the court of first instance, the court should, ordinarily, allow the amendment³. The object is to avoid a multiplicity of suits, and to prevent persons getting a declaration for right in one suit, and immediately after the remedy already available in another.⁴ The ability of the plaintiff to seek further relief dates to the time when the suit is brought and cannot be utilized against him if that ability comes into existence only after the institution of the suit and during the pendency of the suit. Accordingly the plaintiff's right to maintain a suit for a mere declaration is not affected by the fact that during the pendency, the right to possession also accrues to him⁵. It must be understood that this proviso refers to the

1. Sahib Lal (1912) P. R. 10.

2. 60 Bom. 226. Jannabai v. Dattatraya.

3. Kalabhai v. The secretary of State for India 29 Bom. 19.

4. Kunhama 16 Mad. 140.

5. Hurmat Ali Shah v. Tufail Mohammed 16 Lah. 729.

position of the plaintiff at the date of the suit¹, and that the restriction imposed hereby refers to the consequential relief properly obtainable by the plaintiff as against the defendant in the suit and is not to be extended to all third parties who may possibly support some of the contentions of the defendant.² This proviso does not say that the suit is to be dismissed if the plaintiff omits to seek the consequential relief open to him ; all that the court can do is to refuse the declaration ; the plaintiff may then be allowed to amend his plaint if he chose (3 I. C. 141). A declaratory decree can be made notwithstanding that plaintiffs do not sue for possession of lands.³ All that the proviso forbids is a suit for pure declaration without further relief : it does not compel a plaintiff to sue for all the reliefs which could possibly be granted, or debar him from obtaining a relief, which he wants unless at the same time he asks for a relief which he does not want. It is intended by S. 42 to give relief to the plaintiff that would be granted by a Chancery Court in England where no relief at common law was available. The proviso, is as ruled in Madras⁴ only applicable to such relief as is appropriate and consequent on the right asserted. As to cases of amendment of plaint, see *infra*. The further relief referred to in the proviso is further relief in relation to the legal character or right as to any property which any person is entitled to and whose title to such character or right any person denies or is interested in denying and does not include a claim for arrears of rent.⁵ The further relief which the plaintiff is bound to claim is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration. It should be noted that the proviso deals only with plaintiffs who are able to seek further relief; a declaratory decree can be given if the plaintiffs are found not to be able to seek further relief though they thought they were. An injunction is a further relief within the meaning of s. 42 of Specific Relief act.⁶ And a suit for a declaration that

1. Govind v. Perundein 12 Mad. 136.

2. Subraanyam v. Paramaswaram 11 Mad. 116.

3. Lookanath 13 Cal. 47.

4. Kaman v. Krishna 13 Mad. 374.

5. Fakirchand v. Ananda 14 Cal. 588.

6. Kunj Behari Prasad v. Keshavlal 28 Bom. 567.

Deskali Koer v. Keder Nath 39 Cal. 704. Singh Sanatan Dharama High School Trust v. Singh Rajput High School A. I. R. 1938 PC73.

a decree was obtained by fraud does not lie in absence of prayer to set it aside.¹

Possession—To bar a suit for mere declaration it must be shown that the defendant was in possession and as against him the plaintiff could have obtained an order for delivery of possession.² Where the mortgagor is in actual possession of the property, a suit brought by him for a declaration that the mortgagee has been paid in full is maintainable.³ This section does not bar a suit where the dispute is only as to the nature of the possession of the widow defendant and the plaintiff reversioner who admits the possession of the other side is not entitled to sue for possession.⁴ But a suit for mere declaration would be barred where the plaintiffs are admittedly out of possession of waste land and the defendants are keeping them out of it and the plaintiffs are bound to sue for the recovery⁵; so also even if the plaintiff would be entitled to possession (temple management) in alternate years.⁶ Where in a proceeding under S. 145, the Criminal Procedure Code an order is passed under S. 145 of the Code appointing a receiver the person aggrieved can sue for mere declaration of his title against the other side without suing for possession.⁷

A suit for mere declaration that plaintiff is owner of certain property was allowed, as at the time of suit, property was in Custodia Legis.⁸ The restrictions are to be referred to

1. *Bamalkant Jha v. Mukti Nath Jha* A. I. R. 1942 Pat. 3009

2. *Malaya Pillai* 21 M. L. J. 102; *Shankar Narayan v. Putedy Bhatta* A. I. R. 1915 Bom 175.

3. *Sher Singh* 20 I. C. 761.

4. *Ram Manohar Singh* 36 All. 126.

5. *Ishwar Singh* 12 A. L. J. 408.

6. *Apu Pillai* 23 M. L. J. 118.

7. *Administrator of Bengal* 15 C. W. N. 758.

8. *Sundressa Iyer v. S. S. V. Nidhi Let.* A. I. R. 1939 Mad. 853.
Anna Purna Dasi v. Sarat Chandra A. I. R. 1942 Cal. 394.

consequential relief and cannot be extended to third party who support the case of defendant.¹

Amendment of plaint—As we have seen, the court will not make a declaration in cases falling under the proviso ; the suit is not however dismissed all at once in cases of omission to sue for the further relief. The plaintiff is allowed to amend his plaints and proceed with the suit. In Bombay and Madras, the plaints have been allowed to be amended on appeal only where the objection as to the non-maintainability of the suit as framed has not been taken in court of first instance.² In *Kalabhai v. Secretary of State*,³ the appellate court ruled that the lower court should have allowed amendment of the plaint when it was asked for at not a very late stage. But where the objection that the suit was not maintainable was taken in the court of first instance and the plaintiff instead of asking for permission to amend the plaint contended that the suit was maintainable, amendment was not allowed in appeal⁴; In *Sardarsingh v. Ganpat-singh*⁵ the plaintiff had in the appellate court asked for permission to amend the plaint in case the court held that the suit was governed by the proviso. But then if the defendant does not object to the making of the declaration—in the first court—but attempts to meet the plaintiff's case on the merits and fails, he cannot be permitted to raise the objection for the first time in appeal.⁶

Illustrations to S. 42—Illustration (a)—Whether the interest to be defended or attacked be one of status or of

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1. *Humayun Begum v. Mad. Khan A. I. R. 1943 P.C. 94.*
 2. *Limba v. Rana* 13 Bom. 548 ; *Chanu v. Ramana* 14 Mad. 146 ; *Abdul Kadar v. Mahamed* 15 Mad. 15. *Anil Bala v. Madhubandes* 74 Cal. L. J. 341.
 3. 29 Bom. 15.
 4. *Narayan v. Shankuni* 15 Mad. 255 ; *Suryanarayanmurti v. Tawmanna* 25 Mad. 504.
 5. 11 Bom. 395.
 6. *Maganlal v. Govindlal* 15 Bom. 697 ; *Bombay Burma Co. v. Yorksmith* 17 Bom. 197.

right to property, it is a present existing one and the declaration is necessary to remove or avert a present existing damage or risk to such interest ; the plaintiff is also not entitled to further relief. This is seen in Illus. (a) and (b). The plaintiff has a legal character and there is a denial thereof; he need not wait till he is dispossessed.

The converse case of Ills. (a) is where a person being in possession denies the right of the public, any of whom might sue for a declaration:—

Kalidas v. Parjaram.¹ Where the plaintiffs were in the habit of conducting pilgrims to a certain temple and of worshipping on their behalf : the defendants, resident priest prohibited the public from entering the most sacred portion of the temple without the payment of a fee ; the plaintiffs were held entitled to a decree declaratory of their right to free access.

Ramanuja v. Devamuka.² Where a District temple committee had ordered the removal of the plaintiffs from the trusteeship of the temple the plaintiff was held entitled to a declaration that the act of the committee was unlawful, so also in *Limba v. Rama*.³ the plaintiff was allowed a declaration of his right to officiate at particular times as priest at a shrine and receive the offerings made there.

Worshippers of a temple can maintain a suit for a declaration that a permanent lease of temple property granted to the defendants in possession is invalid.⁴

Bisseguar v. Baroda Cant..⁵ A landlord whose title to property is in danger from the aggression of his neighbour can have a declaration of his rights as against the wrongdoer.

1. *Kalidas v. Parjaram* 15 Bom. 399.

2. *Ramanuja v. Devamuka* 8 Mad. 631.

3. *Limba v. Rama* 13 Bom. 548.

4. *Veema Charent v. Soma Panchaya* 43 Mad. 410.

5. *Bisseguar v. Baroda Cant* 10. Cal. 1076.

*Shivram v. Jenu.*¹ So also can a person whose property is sold in execution of a decree against a party—without waiting for dispossession by the auction-purchaser.

Illustration. (b)—In this illustration, though B, C and D have a present existing interest in the property bequeathed to them, it is not certain whether their children who have not yet come into existence, have any rights in the same ; the declaration of the right of the children is an essential condition of a declaration of the rights existing at the time in B, C and D ; the court will not however, proceed to declare the rights of children further than is essential to fix the rights of B, C and D.

Illustration (c)—A court would make a declaration as to the interest of persons not in the case only if it is necessary and unavoidable ; it will not make it if from the frame of the suit it would not bind thereafter the person not then in existence. In England the general practice² is not to decide as to future rights but to wait until the event has happened, unless a present right depends on the decision, or there are some other special circumstances to satisfy the court that it is desirable at once to decide on the future rights ; it will decide if all the parties are of age and are represented before the court. In a recent case the Privy Council refused to make a declaration under S. 42, that the will was void.

A declaratory decree can however be made as to future profits of a company which would go to form a dividend..³

Illustration (d)—Here as we have seen there is a present injury or danger to the reversioner ; and this justifies the declaratory decree. Both the illustrations (d) and (e) relate to suits by reversioners ; but the former relates to suits by reversioner whose interest is apparent and indefeasible—the

1. *Shivram v. Jenu* 13 Bom. 34.

2. *Curtis v. Safie'd* 21 Ch. D. 4.

3. *Bombay Burma Co.* 17 Bom. 97. See the *Togore Case*, L. R. 1. A Sup vol.

latter, to one whose interest though present and existing is not indefeasible but presumptive; in each the act sought to be attacked by a declaratory decree is an act of alienation by the tenant for life.

Illustration (e)—Here the person presumptively entitled has a present interest sufficient to entitle him to sue in order to avert the danger to the future enjoyment of such estate by the detrimental act of alienation without legal necessity. A present interest the enjoyment of which may depend upon the most remote incident is nevertheless a present estate although with reference to the chances it may be worth little or nothing. The more remote the probability of the presumptive reversioner coming into possession the greater the need for a present declaration of right; otherwise by the lapse of time, all trace of the real character of the transaction would be lost. In such cases we have to distinguish between an interest that has arisen whether it be apparent or presumptive, and a mere bare possibility which is neither an interest nor right.¹ Where any deed is executed by the widow of sonless Hindu the result of which may be to prejudice the interest of the reversionary heirs, those heirs though still reversionary; and though they may never get any title because events preclude them from doing so may under section 42, III. (e) have a declaration as to the effect of the deed, notwithstanding the fact that the declaration given involves a finding that the person in whose favour it is made, is a reversionary heir.² Ordinarily in cases as are given in IIIs. (e) and (f) the suit was as held by the P. C. to be brought by the next presumptive reversioner except when the nearest one has colluded with the widow.

Illustration (g)—This is a kind of case in which a declaratory decree is all that a plaintiff requires inasmuch as he has

- 1 *Gremansing v. Wahanlal* 8 Cal. 12; *Davis v. Angel* 7 D.F. & J. 542; *Ganvayar v. Mahalaxmi* 10 Mad. 90.
- 2 *Saudagar Singh v. Pardip Narayan* 20 Bom. L.R. p. 509 (A.C.) = 43 Cal. p. 510. (*Janaki Ammal v. Narayanaswami Aiyar* 38 Mad 684. Distinguished).

no need of the assistance of the court to put him in possession.¹ There is no sound reason for compelling a man when others advance a claim to property which he believes to be his own to wait till his evidence may be lost and to suffer from a possibly serious diminution in the value of that property.

Reversioners.—The right of a presumptive reversioner to sue for a declaratory decree is not restricted to the class of transactions referred to in Ills. (e), (f), i. e., to transactions by the widow herself. He can sue even for a declaration that an alleged will on which certain devisees claim, is invalid.²

A “Hindu” widow can sue for a declaration that she has absolute interest in a property if limitation is placed upon her power to deal with it at the instance of the reversioners.³

43. Effect of declaration—A declaration made under this chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, it in existence at the date of the declaration, such parties would be trustees.

ILLUSTRATIONS

A, a Hindu in a suit to which B, his alleged wife, and her mother are defendants seeks a declaration that his marriage was duly solemnised and an order for the restitution of his conjugal rights. The court makes the declaration and the order. C, claiming that B is his wife, then sues A for the recovery of B. The declaration made in the former suit is not binding upon C.⁴

NOTES

Object of S. 43—S. 43 enunciates a leading principle in the doctrine of *res-judicata*; it is doctrine of universal

1. *Ramajia* 8 Mad. 364.

2. *Pultanna* 30 Mad. 195.

3. *Kesha Ram* 7 A. L. J. 311.

4. *Subhaya v. Nagayya* 71 M. L. 619

application; it is not peculiar to particular decrees only. The rule stated in the section would have applied even without its being mentioned in this Act; it is added here only by way of precaution.

Illustration to the section—It draws attention to the distinction between judgments *in rem* and judgments *inter partes*. The case put in the illustration is an illustration of the latter kind. A prior decision between A and B involving the issue of act whether B had been married to A, or not, could not be conclusive against C in a subsequent suit by him against A.

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

44. Appointment of Receivers discretionary—The appointment of Receiver pending a suit is a matter resting in the discretion of the Court.

Reference to Code Civil Procedure—The mode and effect of his appointment, and his rights, powers, duties and liabilities are regulated by the Civil Procedure Code.

NOTES.

Nature of the Relief—The power of appointing a receiver of property is one long possessed and constantly exercised by English courts of equity. The species of Specific Relief given by S. 44—The appointment of a receiver—is a branch of protective or preventive relief. Equity grants relief to those who seek it upon the principle of *quia timet*. The party seeks the aid of a court of equity because he fears some future probable injury to his rights and interests and not because an injury has already occurred. This relief is given in many differ-

ent ways and the appointment of a receiver is one of them. A receiver is defined to be "an indifferent person between the parties, appointed by the court to receive rents, incomes and profits of lands or other things in question, pending the suit, where it does not seem reasonable to the court that either party should do it, or when a party is incompetent to do so, as in the case of an infant." He is an officer of the court, and its representative, and subject to its orders. The appointment is for the benefit of all the parties interested and not for one of them only. He has to give security unless the parties dispense with it. The appointment of a receiver under S. 44 of this Act is different from that under O. XL, Civil Procedure Code, 1908. Under S. 44 the appointment is in the discretion of the court and it must be made pending a suit and it is only by way of specific relief, a relief based on the principle of *quia timet* ; whereas Civil Procedure Code provides for the appointment of a receiver of any property, moveable or immoveable the subject of any suit under attachment, S. 44 will not apply to property under attachment in execution of a decree ; there the appointment is rather a matter of ministerial procedure than of specific relief. Under the Code he may be appointed even in the case of insolvent judgment debtors.

Pending a suit—Under S. 44 a receiver can be appointed only if an action is pending ; this is because the object of the appointment is to provide for the safety of property pending the litigation, which will decide the rights of litigant parties, It is in this respect that an appointment under this section differs from that under O. XL, Civil Procedure Code. Though the appointment is pending a suit it does not follow that the decree puts an end to the appointment.

The appointment is discretionary with the court—Both in England and India the relief under S. 44 is entirely discretionary with the court which discretion has to be exercised with caution and with regard to the circumstances of the case ; no positive rule of law is laid down.

General Principles—We shall state here some of the leading principles of law as to receiver, *viz.*,—in what cases a receiver should be appointed, his powers and rights when appointed, his duties and liabilities, the practice on and after his appointment. He is appointed when it appears to the court necessary for the realisation, preservation, or better custody or management of the property the subject of a suit. The court exercises its discretion if the plaintiff is eventually likely to succeed. His appointment does not affect the right of a party, for he is an officer of the court holding the property for the party who may ultimately appear to be entitled to it ; money in his hands is in *custodia legis* for whoever can make out a title to it.¹ The object in view is to secure the preservation of the property to its appropriate uses and ends ; the appointment made pending a suit does not end with the decree. Any description of property may be committed to the custody of a receiver, *e. g.*, stock in trade, outstanding assets of a trading partnership's shares in companies, securities in the public funds, rents of a real estate. When there is a dispute as to title to real property, he is appointed only when a strong case of fraud or danger of loss is made out.² Courts were formerly very unwilling to disturb existing possession of a party but recent legislation has given the court larger powers. In case of co-tenants, receiver will be appointed only if the applicant makes out a case of his entire exclusion.³ In case of mortgages a receiver can be appointed as against a mortgagor but not as against the first mortgagee who is rightly in possession unless he has been paid off, or refuses to accept what is due to him or cannot satisfactorily show that anything is due to him⁴ ; in case of trusts the appointment can be made on application of a trustee if the majority act alone and take securities in their own name omitting that of the dissenting

1 *Davis v. Warbhorugh*, 2 Swan 118.

2 *Shrewsbury case*,

3 *Milbank v. Rivett* 2 Mer. 405.

4 *Hills v. Moores* 15 Beav. 174.

trustee.¹ A beneficiary can have a receiver appointed if he can show that the trustee is guilty of misconduct, waste or other improper disposition of trust property or that the trust fund is in danger or that the executor is a person of bad character and habits.² One partner can get a receiver appointed against his co-partner if he can show a dissolution, or facts which if proved would justify a decree for dissolution, : e. g., breach of duty, misconduct, &c., exclusion of one partner. If the partnership is a going concern a receiver will not be appointed unless on the grossest abuses of some of the partners, since the appointment would destroy the trade.⁴ It is not every squabble that justifies interference ; there should be unrighteousness on one side to justify interference. In case of *Firm Pahlad Das Bhagwandas, v. S. Shant Sagars* the Lahore High Court appointed receiver pending sale of judgment debtor's property in execution of a decree against him. The decree holder wanted to get property sold as soon as possible but judgment debtor put all obstructions in his way, it was held that it was just and convenient to appoint receiver. When plaintiff has no chance of success or when plaintiff himself does not show that suit is likely to succeed receiver will not be appointed.⁶ As to his powers the Code authorized a court to confer on the receiver all the powers of an absolute owner of property. The person in possession is not necessarily removed because of the appointment, he is removed only "if need be." It depends upon the nature of property. The tenants are not ejected merely because a receiver is appointed : The court does not all at once give the receiver all the powers of the owner; the court ordinarily states these in the order of appointment. It limits these to such as are needed in the more ordinary and almost daily management of the property. Under the English law the Courts have

1. *Small* 22 Beav. 174

| 3. *Smith v. Joyce* Beav. 505.

2. *Everett v. Prythergh* 12 Sim 367.

| 4. *Oliver v. Himilton*, 2 Anstr 453

5. A. I. R. 1940 Lahore 325.

Bidurrimji v. Kesho Ramji 1939 Oudh 61; *Harkishanlal & Sons. v. Pco. ples Bank of Northern India Limited*, A. I. R. 1936, Lahore 102.

power to appoint a receiver of property outside the jurisdiction of the Court, and the same is the case in India, Court acts in personam. In *Pramanath Malla V. H. V. Loward Co.*, it was held that original side of High Court has always such power but it is duty of court to be careful and sparing in exercise of its powers. This principle has been followed in the following cases. He can in England distrain for one year's rent in arrear, can lease the property for a time, spend small sums for repairs, &c.; but he cannot turn out tenants or raise rents upon slight grounds. He can sue without leave in case of necessity. He is entitled to such remuneration as is fixed by the Court, this is in the shape of fees or commission; it is ordinarily 5 P. C. on the income, and is borne by the estate. As to his duties and liabilities it must be noted that he has to give security. Ordinarily he gives a bond and two securities in a certain amount; sometimes he has to deposit money or public bonds in lieu of security. If the parties desire security may be dispensed with; but when court appoints a person it invariably demands security except in the case of an official assignee, &c. As to the amount, the court does not exact more than double the approximate income for the year. He has to pass his accounts and pay the balances due into court at stated times as directed in the order of appointment; he would lose his commission if he fails to pass accounts. He would have to pay interest if he retains balance with him.² He is liable for damage caused by wilful default or gross negligence: he is subject to the same liability as an ordinary trustee (see Ss. 46 to 54 Indian Trusts Act). In case of receiver, want of ordinary diligence is equivalent to gross negligence.³

As to the practice of appointing a receiver, see O. 40, r. 1 the power of appointment is given to all Courts. The Collector is to be appointed in some cases of landed property. Motion for receiver may be made at any stage in the suit

1 *Chandulal v. Maneklal* 55 Bom. 309. *Ismailji vs. Ismailji*. 45 Bom. 1128, 75 Cal. 964, *Pramnath vs. H. V. Loward Co.*; A. I. R. 1938 Lahore 93 *Sunder Si. h A. Gangaram*—

2 *White v. Lincoln* 8 ves. 371.

3 *Skirrels* 2 Hog. 192.

and need not necessarily have been asked for in the plaint. Generally it is not granted without notice to the other side; in case of emergency an *ad interim* receiver can be appointed. The motion should be verified by affidavits verifying such facts as constitute the necessity for the receiver, the nature and value of the property to be affected should be specified, and it should be shown that the person proposed as receiver is a fit and proper person. The order operates as between the parties to the suit from the date of its being made. He cannot be discharged on the mere application of one party.

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

45. Power to order public servants and others to do certain specific acts—Any of the High Courts of Judicature at Calcutta Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior court of judicature.

Provided —

(a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act ;

(b) that such doing or forbearing is under any law for the time being in force clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;

(c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

(d) that the applicant has no other specific and adequate legal remedy; and

(e) that the remedy given by the order applied for will be complete.

Nothing in this section shall be deemed to authorize any High Court—

(f) to make any order binding on the Secretary of State, the Central Government, the Crown representative or any Provincial Government.

(g) to make any order on any other servant of the crown, as such, merely to enforce the satisfaction of a claim upon the Crown; or

(h) to make any order which is otherwise expressly excluded by any law for the time being in force.

NOTES.

The scope of the Chapter—Ch. VIII embodies the rules relating to the high constitutional power vested in the High Courts at Calcutta, Madras and Bombay for the enforcement of public duties; the exercise of these powers is confined to the local limits of the ordinary original civil jurisdiction of such courts. The power conferred are very similar to those exercised through the old prerogative writ of *mandamus* for which they are substituted. In *England* the object of the common Law writ, of what is technically known as the prerogative writ of *mandamus*, is the enforcing of public duties. "It is a high prerogative writ" of a most extensive remedial nature, and is in its form a command issuing in the King's

name from the Court of King's Bench and directed to any person, corporation or inferior court of judicature, requiring them to do some particular thing therein specified, which appertains to their office and duty; but then it is very sparingly issued. It is not issued till the court is satisfied that no effectual relief can be obtained in the ordinary course of an action at law. The procedure both in England and India is much the same. In *England* it is as under:—

(i) The proceedings begin with an application on oath of the party with full detail.

(ii) Rule may then be issued against the opponent to show cause, why a writ of *mandamus* should not issue, (it is rarely made absolute without notice to the other side).

(iii) If no sufficient cause is shown, the writ is issued, at first in the alternative, either to do the act or show reason against it within a specified time.

(iv) If no return is made to the writ, he is liable to punishment; if it is made, but is found insufficient in law or false in fact a peremptory *mandamus* is then issued to do the thing absolutely; he must obey this to the letter (*Nelson*).

Formerly, only the supreme courts had the power to issue a writ of *mandamus*—The passing of the Specific Relief Act has taken away this right, but conferred a right to make an order requiring a public officer to do or forbear a specific act. It is confined only to the High Courts of Calcutta, Madras, Bombay and Rangoon.

Bombay High Court has jurisdiction to issue writ of Prohibition as well as writ certiorari. But Bombay High Court has no jurisdiction to issue writ a certiorari where parties to the proceeding are outside jurisdiction of the Court, even though the tribunal against whom writ is to be issued has its office within jurisdiction of the Court. It has been held in 47 Bom. L. R. 1102 that the jurisdiction of Bombay High Court to issue writ of prohibition is not taken away by any enactment of Section 45 of Specific Relief Act.

Jurisdiction of chartered High Court to issue writ of prerogation can only be taken away by express negative words in a statute. (Remarks in 28 Bom. L. R. 264 *Mahmad ali V Jaffarbai* are obiter of *Parlakimedy*.)

47 Bom. L. R. 525 *Ryots of Garabandho. Vs. Zamindar*
47 of Bom. L. R. 1070 *Juggilal Kamalpat Collector of Bombay*.

48. Bom. L. R. 76 *Ahmedabad Cotton Mafg. Co. Ltd. V. Textile Labour Association*.

Lady Dinbai Petit V. M. S. Norhona 48 Bom. L. R. 255.
Shankarlal V. Municipal Commissioner of Bombay. 41 Bom. L. R. 911.

This chapter does not apply to the High Court of Allahabad, the High Court of Lahore, and the High Court of Patna.¹

Inferior Court of Judicature—A Presidency Magistrate's Court is an inferior Court of judicature. This section is held to be wide enough in its terms to apply to a case where a person applies to a Presidency Magistrate for copies of the depositions of witnesses and the orders recorded on a complaint and is refused permission to have them.² If a prosecutor has a right to such copies his personal right would be injured if they were refused. An application under S. 45 to compel the Magistrate to furnish such copies is not one for the purpose of enforcing Criminal Law under S. 7, because copies may be required for many purposes. Besides in such a case the applicant cannot be said to have any other specific and adequate legal remedy.

Elements of application—The application will be dismissed as defective if it does not point out clearly the

1 *Surajmal Brijlal v. Commissioner of Income Tax Bihar & Orissa* (1931) 10 Pat. 218.

2. *Bank of Bengal v. Dinanath* 8 Cal. 166.

specific act or forbearance and the individual against whom it is directed.¹

It may also be noted that the conditions contained in the provisos (a) to (e) of this section are cumulative, that is if any one of them is not complied with the section will not be applied. In short all the conditions must be fulfilled.²

Jurisdiction is discretionary—Jurisdiction of High Court to make order under section 45 is discretionary entirely.

The duty must be clear and specific—Primarily it is for the applicant asking for a rule under this section to show that as required by Cl. (b), the doing or forbearing to do the act in question by the opponent was clearly incumbent upon him in his public character. In 48 Bom. L. R. 365 D' Souza v. Reserve Bank of India it was held that a writ of mandamus could not be granted when Section 45 of Specific Relief Act as in circumstances of the case, it could not be said that it was clearly incumbent upon the Bank to make unconditional payment on the Bank note.³ After coming into operation of High denomination Bank notes (Demonitisation) Ordinance 1946, the petitioner as holder of Bank note of Rs. 1000 issued by Reserve Bank of India, presented it to Bank with demand for payment in discharge of unconditional promise to pay the bearer. The Bank refused to promise payment unless petitioner filed in requisite declaration as required by ordinance. The petitioner filed a petition in Bombay High Court under Sec. 45 of Specific Relief Act for mandatory order on Bank to discharge unconditional promise to pay Rs. 1000/- without imposing any condition upon him. It was held that no such application could be maintained and clause 6 of ordinance modified statutory liability under Sec. 29 of Reserve Bank of India Act. The same view was expressed by Calcutta High Court. In *Muttylal Ghosh*⁴ it was held that the court

1. Vijayaraghava Pillai 26 M. L. J. 310.

2. In re Abdul Rasul 41 Cal. 518; Rustom v. Kenedy 26 Bom. 396.

3. D'Souza v. Reserve Bank of India 48 Bom. L. R. 365.

4. Muttylal Ghosh 19 Cal. 792.

would not compel the chairman of a Municipality to remove particular candidate's name from the list of candidates, because under Ss. 1 and 31 of the Bengal Act 2 of 1888 there was no duty incumbent upon the chairman to exercise any judicial discretion or taking any judicial action with regard to the list of candidates for election. But then it should be noted that the High Court has jurisdiction by a proceeding in the nature of a *quo warranto* to restrain a person who has not been duly elected from exercising the functions of a duly elected Municipal Commissioner.¹ The court can also enjoin the alleged performance of a public duty by a person acting as, but not really being, a public officer (*Lewis* 4 Ch. D. 55).

The omission of a statutory officer to perform the public duties as to the settlement of election roll in the manner provided by the Act amounts to a doing or forbearing to do something not consonant to right and justice and High Court can interfere.² " The syndicate of the university is a statutory body of persons holding a " public office " within the meaning of this section though no emoluments are attached to that office. The person protesting against the resolution of the senate, is entitled to the relief sought for as an ' injured ' person, even though there may be others equally entitled to protest in the same matter " ³.

Even in cases coming under S. 33 of The Indian Income Tax Act, the Commissioner of Income Tax is bound to state a case to the High Court if in the course of inquiry under that section any question of law arises in the case and if he improperly declines to do so, the High Court may under the discretionary power vested in it by S. 45 (of this Act) compel him to do so in proper cases⁴. But this decision of Madras High Court

1. *Corkhill* 22 Cal. 717.

2. *Romesh Chunder Sen* 39 Cal. 593 ; *In re Surendra Chundra Ghore* 45 Cal. p. 950.

3. *In the matter of G. A. Natesan and K. B. Ramathan* 40 Mad. p. 125.

4. *In re Shaikh Abdul Kadar* 49 M. 725.

is doubted in Bombay High Court ruling by Beaumont C. J., that Commissioner is not bound to make a reference under Sec. 66 of Indian Income Tax Act.¹

The High Court has power under S. 45 to make an order requiring the Chief Revenue-authority to state a case and refer it to the High Court when in the course of an assessment a serious question of law arises.²

The applicant must have no other specific remedy—Though the plaintiff satisfies the Court that his case is otherwise covered by S. 45, the Court will not exercise its prerogative unless satisfied that the applicant has no other adequate and specific legal remedy. A Court will not in a proceeding under this section interfere if the applicant has another adequate legal remedy; it will not go into a question of title³. Thus In re. *Bombay Fire Insurance Co.*⁴ where a person who having purchased some shares in a company, on refusal by the directors of the company to register him as a shareholder, applied for an order under S. 45 to compel the directors to register his name, the Bombay High Court refused to pass the order on the ground that the applicant had another specific and adequate remedy under S. 58, Indian Companies Act, VI of 1882.

The words "legal remedy" in S. 45 (d) Specific Relief Act include any remedy given by law including statute law and would not necessarily be confined to a legal remedy enforceable only in a court of law.⁵

"Specific and adequate remedy" in sub-section (d) of

1. *Tata Hydro Electric Agency Ltd. v. Commissioner of Income Tax*, Bombay 36 Bom. L. R. 23.
2. *Alcock, Ashdown and Co. Ltd. v. The Chief Revenue authority of Bombay* (1923) 47 Bom. 742 (P. C.)
3. *Kesho Prosad Singh* 38 Cal. 553=15 C. W. N. 503.
4. 16 Bom. 396.
5. *Trustees of the Port of Bombay v. Municipal Corporation of Bombay* 32 Bom. L. R. 420.

S. 45, Specific Relief Act, refers not to a general right of suit which must unless expressly barred, always exist, but to some specific remedy expressly given by a particular Act.¹ An order under S. 45 is only to be made if the plaintiff has no other specific and adequate legal remedy.² In recent Bombay High Court Ruling, the expression any law for "time being in force" used in proviso to (b) to Sec. 45 of Specific Relief Act should be read as "Royal Charter, Statute, or Common Law" as known in England. i. e, not only statute or enactments of Indian Legislature but also Common Law of Land which is administered by courts in British India. The phrase, "specific and adequate legal remedy" as used in proviso (d) to Section 45 means a remedy which is equally speedy, beneficial, effectual. Where no such specific or adequate legal remedy exists, it is open to person to file an application for obtaining an order under Section 45. Clause (i) of Section 45 is enacted to meet cases in which party against whom order under this section is sought was merely working as agent of Crown, or representative of Provincial Government and besides his duty to principal, he owes no duty to subject; Court has jurisdiction to act under clause (g) of Section 45.³

In England, mandamus have been issued to Municipal and other corporations, to Railway and other companies, to poor law guardians, to local boards, to district and burial boards, to sewer drainage and inclosure commissioners, to church wardens and vestries, to road and river trustees, to railway commissioners and other public bodies. They have also been issued to such high officers as Lord Lieutenants, to Sheriffs, Parish Officers, Gaolers, and Savings Bank Managers,⁴

1. *In re Manick v. Corporation of Calcutta* 48 Cal. 924.

2. *Trustees For the development of the City of Rangoon v. G. S. Beharo & Sons* (1932) 10 Raog. 412.

3. 47- Bom. L. R. 1010 Tan. Bug Taim V Collector of Bombay.

4. *Directors and Monely Smith* 12 Q. B. D. 481.

In India, before mandamus can issue to public servant it must be shown that duty is cast upon public servant¹

General—It is a rule of prudence though not of law that a demand should first be made by the party injured on the person or body bound to perform and their refusal should be proved to the court. In England a *mandamus* has never been granted to deprive one of an office; in India it would perhaps be allowed because the section is comprehensive: 4 Mad. 223. The application ought not to be premature, nor be unreasonably delayed.² In case of a court, judicial discretion used arbitrarily is a ground for a *mandamus*.³ The public duty must be an imperative one, *i. e.*, one as to which no liberty of choice as to the performance or non-performance of it, is left with the officer or tribunal that has to discharge it.⁴ An, impossible act will not be ordered.⁵

46. Application how made—Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof.

Procedure thereon—And the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it or grant a rule to show cause why the order applied for should not be made:

Order in the alternative—If, in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first

1 60 Bom. 900 Income Commissioner V Bombay Trust Corporation.

2 R. V. Leads 11 and E. 316.

3 Q. V. Lichfield 7 Mad. 280.

4 R. V. Jomey 2 B. & C. 591.

5 Bristol R. Co. 3 Q. B. D. 10

make an order in the alternative either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

47. *Peremptory order*—If the person, court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

NOTES.

Peremptory mandamus is defined in *Wharton's Law Lexicon* to be a second mandamus which issues where the return which has been made to the first writ is found either insufficient in law or false in fact. To this writ no other return will be admitted but a certificate of perfect obedience and due execution.

48. *Execution of, and appeal from, orders*—Every order under this Chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

49. *Costs*—The costs of all applications and orders under this Chapter shall be in the discretion of the High Court.

50. *Bar to issue of mandamus*—Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

NOTES

This is because this chapter (Ch. VIII) is a substitute the old proceduæ of *mandamus*.

51 *Power to frame rules*—Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this Chapter; and, until such rules are framed, the practice of such court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this Chapter.

Bombay High Court Rules.

The High Court of Bombay has framed following Rules ;—

Every application under chapter 8 shall be instituted in the matter of the Act and of the applicant and be made on motion in open Court before one of the Judges on the original Civil side of the court and shall be supported and answered by affidavit unless, in lieu thereof or in addition thereto, the court shall direct oral testimony to be taken.

Any rule granted in such application, unless judge otherwise orders, be returnable 4 days after service, and all affidavits in reply shall be forced in the Prothonotary's office, and copies served upon applicant at or before 4-30 P. M. on day preceeding showing cause against the application, If cause be shown or answer made on affidavit, putting in issue any material question of fact, the court may

adjourn the matter to some other date for hearing upon testimony of witnesses to be examined in the manner in the suit.

When the matter is adjourned for hearing, either party may obtain summons to witnesses and procedure in all other respects shall be in the suit.

The Court may in discretion order any rule under chapter 8 to be served on party affected by act done or forborne.

PART III.

Of Preventive Relief.

CHAPTER IX.

OF INJUNCTIONS GENERALLY.

52 *Preventive relief how granted*—Preventive relief is granted at the discretion of the Court by injunction, temporary, or perpetual :

Notes :—

Buney defines an injunction as a “judicial process by which one who has invaded or threatened to invade the rights legal or equitable of another is restrained from continuing or commencing such wrongful act.” The best definition is given by Lord Halsbury when injunction is defined as “judicial process whereby a party is ordered to refrain from doing or to do a particular act or thing.” There are three characteristics of injunction (1) It is a judicial process (2) Object is to restrain or prevent (3) Thing restrained or prevented is a wrongful act.

The right to an injunction in India depends on Statute of Specific Relief Act chapter 9 and 10. Chapter 9 consists of Section 52, 53; Section 54 deals with perpetual injunction.

53. *Temporary Injunctions*—Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

Perpetual Injunctions—A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit ; the defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an act, which would be contrary to the rights of the plaintiff.

NOTES.

Object of an Injunction—*Story* defines the object of an injunction to be to “restrain the undue exercise of rights, to prevent threatened wrongs, to restore violated possessions and to secure the permanent enjoyment of the rights of property.” It is therefore that the specific relief afforded by means of injunctions is called preventive relief. It is a remedial order, but it is a preventive rather than a curative. Its general purpose is to restrain the commission of some wrongful act of the party enjoined.

Injunction is granted at the discretion of the court—Though the granting of an injunction was and is at the discretion of the court, it should be noted that courts of equity are of late liberal in granting it than they used to be in former times ; no hard and fast rules are laid down for defining the wide powers of a court to administer preventive relief though certain preliminary rules are laid down in Ss. 53-57 of this Act. *Story* says “ that courts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases in which injunctions shall be granted or withheld; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights or redress wrongs. The jurisdiction thus operating by way of injunction is manifestly indispensable for the purposes of social justice in a great variety of cases and therefore should be fostered and upheld by a steady confidence. At the same time since the exercise of it is attended with no small danger both from its

summary nature and its liability to abuse, it has to be guarded with extreme caution and applied only in very rare cases; otherwise instead of becoming an instrument to promote the public as well as private welfare it may become a means of extensive and irreparable injustice. The court considers the balance of hardship, inconvenience and injury on both sides but more particularly whether the doing of the things sought to be restrained must produce an injury to the person seeking the injunction.

Injunction, says *Story*, will be refused—

(i) When it would operate oppressively or inequitably or contrary to the real justice of the case.

(ii) Where it is not the fit and appropriate mode of redress.

(iii) Where it would work or might work an immediate mischief or fatal injury.

(iv) Where unreasonable or inconvenient consequences, might ensue.

The different kinds of injunctions—An injunction may be temporary, *i. e.*, such as continues until a specified time pending a litigation, or perpetually *i. e.*, made at the final hearing on the merits, perpetual enjoining the defendant to abstain from injuring the plaintiff's right. The division is in respect of their duration. The principles regulating the granting of these are mainly the same; but then the person seeking a temporary or interlocutory injunction has not to make out a case which would be required in case of a perpetual injunction. A *temporary* injunction can at the first continue till the final hearing of the suit; it may be dissolved at any prior stage: if it is affirmed at the final hearing and is embodied in the decree, it becomes *perpetual*. It is thus provisional in its nature and does not conclude a right, its object and effect being merely to preserve the property in dispute in *status Quo* until further orders of the

court. It is enough, says *Kerr*, "for the plaintiff to show that he has a fair question to raise as to the existence of the right which he alleges and can satisfy the court that the property should be preserved in its present actual condition until such question can be disposed of. He must show that injunction is the appropriate relief and that unless the defendant is at once restrained by an injunction, irreparable injury or in convenience may result to the plaintiff before the suit can be decided on its merits. There should only be the alternative of interference of probable destruction of the property ; if the suit shows a substantial question between the parties the title to the injunction may be good, although the title to the relief prayed may ultimately fail." The granting of this, *i. e.*, temporary injunctions, is regulated by the Civil Procedure Code, Order XXXIX, rules 1 & 2 where as the subject of perpetual injunctions is dealt with by Ss. 54 to 57 Specific Relief Act. A perpetual injunction is said to be mandatory (S. 55) when it relates to the doing and not necessarily forbearing, or when it orders the doing of a particular thing in order to prevent the breach of an obligation, e. g., when the building of one person is an obstruction to the light and air entering through the plaintiff's window. It is a perpetual injunction. A perpetual injunction differs from a temporary one in these respects:—

(i) the restraint imposed by the latter is not a perpetual one as in the case of the former ;

(ii) it does not conclude the right as a perpetual one does ; and

(iii) it is given at any stage of the case, whereas the former is given at the hearing on the merits.

It is not correct to say that a temporary injunction will be granted in every case in which a perpetual injunction might fitly be granted at the hearing.

O. 39, Rr. 1. 2 of the Civil Procedure Code—

O. 39, rule 1 relates to injunctions against waste *pendente lite* and rule 2 relates to injunction against breaches of contracts and against torts. The power given by rule 1, is substantially the same as that long exercised by English Court of equity. The object is to restrain the defendant from doing anything which may prevent the property remaining in *status quo* during the pendency of a suit. This section would apply to cases of vexatious alienations of real property *pendente lite*, the transfer of moveables, *e. g.*, negotiable securities, stock, improper payment of money in violation of a trust, transfer of diamonds, heirlooms covered by S. 11 of this Act. It is a general rule of English Law to restrain all vexatious alienations of property pending a suit.

Order 39, rule 1 : If in any suit it be proved by affidavits or otherwise,

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party, to the suit or wrongfully sold in execution of a decree, or

(b) that the defendant threatens or intends to remove or dispose of his property with a view to defraud his creditors, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or dispossession of the property as the court thinks fit, until the disposal of the suit or until further orders.

Order 39, rule 2 : In any suit for restraining the defendant from committing a breach of contract or other injury, or any kind whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any

breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

The court may ~~be~~ order grant such injunction on such terms as to the duration of the injunction keeping an account, giving security, or otherwise as the court thinks fit, or refuse the same.

- In case of disobedience or of breach of any such terms an injunction granted under these rules may be enforced by the imprisonment of the defendant for a term not exceeding 6 months in civil prison or by the attachment of his property or both.

No attachment under these rules shall remain in force for more than one year at the end of which time, if the defendant has not obeyed the injunction the property attached may be sold and out of the proceeds the court may award to the plaintiff such compensation as it thinks fit and shall pay the balance, if any, to the party entitled thereto.

CHAPTER X

OF PERPETUAL INJUNCTIONS.

54. *Perpetual injunctions when granted.*— Subject to the other provisions contained in or referred to by this chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II of this Act

When the defendant invades or threatens to

invade the plaintiff's right to, or enjoyment of property, the court may grant a perpetual injunction in the following cases, namely :—

(a) Where the defendant is a trustee of the property for the plaintiff;

(b) where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion;

(c) where the invasion is such that pecuniary compensation would not afford adequate relief;

(d) where it is probable that pecuniary compensation cannot be got for the invasion;

(e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.¹

Explanation.—For the purposes of this section a trade mark is property.

ILLUSTRATIONS

(a) A lets certain land to B and B contracts not to dig sand or gravel thereout. A may sue for an injunction to restrain B from digging in violation of his contract.

(b) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(c) The Directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them.

(d) The Directors of a fire and life insurance company

1. *Mansa Tewari v. Parmeshar Tewari* (1929) 27 A. L. J. p. 754.

are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(e) A, an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f) A, a trustee for B, is about to make an imprudent sale of a small part of the trust-property. B may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(g) A makes a settlement (not founded on marriage or other valuable consideration) of an estate on B and his children. A then contracts to sell the estate to C. B or any of his children may sue for an injunction to restrain the sale.

(h) In the course of A's employment as a Vakil, certain papers belonging to his client B, come into his possession. A threatens to make these papers public, or to communicate their contents to a stranger. B may sue for an injunction to restrain A from so doing.

(i) A, is B's medical adviser. He demands money of B, which B declines to pay. A then threatens to make known the effect of B's communications to him as a patient. This is contrary to A's duty, and B may sue for an injunction to restrain A from so doing.

(j) A, the owner of two adjoining houses, lets one to B and afterwards lets the other to C. A and C begin to make such alterations in the house let to C as will prevent the comfortable enjoyment of the house let to B. B may sue for an injunction to restrain them from so doing.

(k) A lets certain arable land to B for the purposes of husbandry but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B threatens to sow the lands with seed injurious there to and requiring many years to eradicate. A may

sue for an injunction to restrain B from sowing the lands in contravention of his implied contract to use them in a husband-like manner.

(l) A, B and C are partners, the partnership being determinable at will. A threatens to do an act tending to the destruction of the partnership-property. B and C may, without seeking a dissolution of the partnership, sue for an injunction to restrain A from doing the act.

(m) A, a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(n) A, B and C are members of a undivided Hindu family, A cuts timber growing on the family-property, and threatens to destroy part of the family house, and to sell some of the family utensils. B and C may sue for an injunction to restrain him,

(o) A, the owner of certain houses in Calcutta, becomes insolvent. B buys them from the official assignee and enters into possession. A persists in trespassing on and damaging the houses, and B is thereby compelled, at a considerable expense to employ men to protect the possession. B may sue for an injunction to restrain further acts of trespass.

(p) The inhabitants of a village claim a right of way over A's land. In a suit against several of them A obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sue A for obstructing his alleged right of way over the land. A may sue for an injunction to restrain them.

(q) A, in an administration suit to which a creditor B, is not a party, obtains a decree for the administration of C's assets. B proceeds against C's estate for his debt. A may sue for an injunction to restrain B.

(r) A and B are in possession of contiguous lands and

of the mines underneath them. A works his mine so as to extend under B's mine and threatens to remove certain pillars which help to support B's mine. B may sue for an injunction to restrain him from so doing.

(s) A rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier B. B may sue for an injunction restraining A from making the noise.

(t) A pollutes the air with smoke so as to interfere materially with the physical comfort of B and C, who carry on business in a neighbouring house. B and C may sue for an injunction to restrain the pollution.

(u) A infringes B's patent. If the court is satisfied that the patent is valid and has been infringed, B may obtain an injunction to restrain the infringement.

(v) A pirates B's copyright. B may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w) A improperly uses the trade mark of B. B may obtain an injunction to restrain the user, provided that B's use of the trade mark is honest.

(x) A, a tradesman, holds out B as his partner against the wish and without the authority of B. B may sue for an injunction to restrain A from so doing.

(y) A, a very eminent man, writes letters on family topics to B. After the death of A and B, C who is B's residuary legatee, proposes to make money by publishing A's letters. D, who is A's executor, has a property in the letters, and may sue for an injunction to restrain C from publishing them.

(z) A carries on a manufactory and B is his assistant. In the course of his business, A imparts to B a secret process of value. B afterwards demands money of A, threatening, in

case of refusal, to disclose the process to C, a rival manufacturer. A may sue for an injunction to restrain B from disclosing the process.

NOTES

In matters of issuing injunctions law cannot make over-nice distinctions and refuse relief merely because there is bare possibility that evil against which an injunction is sought may be avoided. Proceeding upon practical views of human affairs, law will guard against risks which are so eminent that no prudent man would incur them, although they do not amount to absolute certainty of damages. Law will go further; according to same practical and rational view, and balancing magnitude of evil against chances of its re-occurrence, it will provide against some what less eminent probability in cases where mischief would be vast and over whelming.¹

✓ **Scope of S. 54**—S. 54 gives us the general principles on which a perpetual injunction would be granted in cases of contract and in cases of tort. This section does not introduce any new principles of law into India; but expresses in general terms the rules acted upon by courts of equity in England, and long since introduced in India because they were in accordance with equity and good conscience.² On analysing section 54, we find that in case of contract the rules laid down in Ch. II are to be applied, and in case of torts, the third paragraph and clauses (a) to (c) apply. S. 12 gives cases where a court would order specific performance of a contract; and Cls. (a) to (d) of S. 54 governing to grant of injunction in case of torts are precisely *mutatis mutandis* to those in S 12, Cl. (c) of this section is rather a matter of procedure, than of substantive law; on examining the illustrations we find that Illus. (a) to (h) relate to injunctions in case of contracts and breaches of obligations; whereas illus. (i) to (z) deal with cases of torts. In a contract the

1 A. I. R. 1936 Mad. 202. Shan Mugavel v. Venkataswami.

2 Shamnagar Jute Factory 14 Cal. 184.

terms are either affirmative or negative ; in the former case the remedy is by way of specific performance—and in the latter. *i. e.*, if they be negative the remedy is by way of an injunction. It is therefore said that an injunction is in effect specific performance of the contract. It is not necessary here to say anything as to Ss. 55–57 the remaining sections of the chapter beyond the fact that S. 55 explains what is mandatory injunction, Sections 54 and 56 are to be read together as supplementing each other. The former defines circumstances under which perpetual injunction may be granted, the latter enumerates case where in injunction must not be granted.¹ S. 56 gives the general defences to an action for perpetual injunction, S. 57 speaks of injunction in case of negative covenants where affirmative ones are not capable of being specifically enforced. ✓

Injunction in case of contracts and other obligations—Paragraph (a) merely says that a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant ; it may arise expressly or by implication ; when this obligation (which includes every duty enforceable by law) arises out of contract the courts have as said in second paragraph to be guided by rules laid down in Ss. 12–30 of this Act relating to granting of specific performance of contracts. It may be noted at this stage that the word objection is used in the act in a very wide sense² ; and what is the reason of applying the rules as to specific performance to injunctions ? It is, says, Fry, " because it is evident that whenever the court grants an injunction restraining the breach of an express or implied term of a contract, it thereby *pro tanto* specifically enforces the performance of the contract, It is not always that the terms of a contract are of an affirmative nature ; they may

1 Sheonandan Prasad V, Shew Parson Pathah 1942 Pat. 349=A. I. R. 1937 L 545.

2 Municipal committee Moutogemery V Sant Singh. I. L. R. (1940) Lah. 707 ; Lahore Electric Supply Co. Ltd. V. Secretary of State A. I. R. 1938 Lahore 585.

be affirmative or negative, or though affirmative in substance they may be of a negative character ; when the court has to enforce the performance of the negative covenants the remedy in equity is by an injunction ; if they be affirmative the remedy would be under Ch. II. Thus it is clear that an injunction is in effect itself a specific performance of the contract ; S. 54 has to be read with S. 56 and S. 57 ; Cl. (f) to S. 56 lays down that a perpetual injunction will not be granted to prevent the breach of a contract the performance of which would not be specifically enforced. In such a case the party is left to his remedy of damages ; and S. 57 says that in spite of S. 56, Cl. (f), the negative covenants in a contract can be specifically enforced by an injunction though the affirmative one cannot be specifically enforced. The negative covenants may be express or implied ; but then the affirmative and negative covenants must be distinct and separate. The result is that a contract cannot be the subject of an injunction if specific performance must be refused under the provisions of chapter II, unless it falls within the exceptions contained in S. 57¹. The classes of cases covered by this para are cases of simple negative covenants, cases in which the injunction is applied in support of one or more covenants forming part of a contract. [as in cases between landlord and tenant, case between partners—where the injunction is granted in aid either of express covenants, or of the duties arising out of the relation of partnership, cases in which the injunction is in aid of the obligations arising out of any fiduciary relation between the parties. But where the crux of Plaintiff's complaint is that defendants are trying to persuaded members of community form joining in a celebration by plaintiff, it is difficult how far Law can intervene if possession is not accompanied with force or violence.² These we shall discuss in brief while examining the illustrations.]

1 Madras Ry. Co. v. Rust. 14 Mad. 18.

Parmo Singh v. These Charan Goswami I. L. R (1938) 2 Cal. 357.

2 Dipchand Kundan mal v. Manechand I. L. R; 1939 Nag 429.

Injunction in case of Torts—Examples of injunction in such cases are to be found in illustrations (i) to (z). It is for the plaintiff to show that his right to, or his enjoyment of property is invaded or threatened, and that one or other of the facts mentioned in Cls. (a) to (c) exist in his favour. But even then the courts are not bound to grant an injunction; the court would exercise judicial discretion and weigh the amount of substantial mischief done or threatened to the plaintiff, and compare it with that which the injunction if granted would inflict upon the defendant. The generality of cases for injunction come under Cl. (c), *i. e.*, where the invasion is such that pecuniary compensation would not afford adequate relief; this is a matter of difficulty though it is a question of fact. In *England* the test is as under:—‘Damages’ and not injunction, should be given where the injury is not so serious that the property might not still remain the plaintiff’s and be so substantially useful to him as before. The cases in which a court issues injunction against torts are trespass, injuries to reversion, easements (right to support, to light and air, right to way and to water, ferries, market) infringements of patent, copyrights, trademarks, disclosure of confidential communications, papers, secrets &c. When and under what circumstances an injunction is issued or refused in such cases can be seen from illustration (i) to (z) and the detailed examination of the same below. The fact that question of title may have to be gone into in deciding whether injunction should be given or not is no justification that suit is for declaration and for injunction. Suit for injunction is maintainable.¹

Light and air cases—In cases of obstruction to light and air, injunction is the rule and damages an exception.² An injunction may be granted in case of illegal attachment

1 A. I. R. 1935 Madras 200 Veerappa chettiar v. Arun Chellam chetty.

A. I. R. 1936 Mad. 936 Swaminath v. Narayan swami.

A. I. R. 1944 Mad. 221 Abdul Nabi v. Bhajant.

A. I. R. 1944 All. 220. Shyam Lal v. Nandlal.

A. I. R. 1937 Lah. 543 Sheo Nand Prasad v. Sheo Darsan Pathak.

2 Ramanjulu Naidu 21 M. L. J. 513=9. M. L. T. 383.

of standing crops as also to restrain erection of a cornice or roof or wall.¹ ✓

Illustrations to S. 54.—*Illustration (a)*—This is an instance of a contract between *landlords and tenants* with different covenants some of which need to be maintained. If it is not restrained the tenant would at the end of his term leave the landlord the bottom of the gravel pit for his estate. A tenant can be restrained from converting houses to a different use from that prescribed by his lease. The object of the injunction is to maintain the contract in its integrity.

Illustration (b)—This as well as illustrations (b) to (i) relate to cases where the injunction is to enforce an obligation arising out of some *fiduciary relation*. The fiduciary relation is constituted by some contract. A trustee is liable for the act of a co-trustee if he does not take active measures for the protection of the beneficiaries' interest; this he can do by obtaining an injunction²; similarly a beneficiary may restrain the trustee from doing an act not authorized by the trust instrument.

Illustration (c)—This is an example of a class of cases where *Directors of a company* who are trustees for the shareholders, threaten acts in violation of their duty and which a shareholder may sue to restrain. It rests on the principle that the act contemplated is an employment of the funds of the company contrary to the intended purpose: It is an act *ultravires*. The principle of *Natuch v. Irving* that expenditure must be limited to the proper object of the company applies under all system of law. A company formed for one trade cannot engage in another.³ In England courts have restrained by injunctions similar acts, *viz.*, illegal issue of shares, registry of improper transfer of shares, loans to Directors, etc.

1 *Ambadas v. Dattatrya* I. L. R. 1944 (Nag) 753.

2 *Chertsey Market* 6 Price 278.

3 *Shamnagar Jute Factory* 14 Cal. 189.

Illustration (d)—It relates to *acts which are ultra vires of the company* which are breaches of contract express or implied with the shareholders. The fact that the new business is profitable is immaterial¹. On this principle a company embodied for a specific purpose is not allowed to delegate its powers or transfer its business to be amalgamated with another company unless the transaction is warranted by the memorandum of Association.

Illustration (e)—It is a matter of common knowledge that an *executor* who has accepted that position is a trustee on behalf of all interested under the will—so far as the due administration is not granted merely because an executor is in mean circumstances; it must also be shown that there is danger therefrom to the estate of the deceased.

Illustration (f)—The ground of this special interference in spite of the available remedy of damages is that since the *beneficiary* is to the limit of his interest, the true owner of the property, he has a right to restrain the trustee from dealing with it on his behalf otherwise than a prudent owner would deal with it. After a conflict of decisions, it is now decided that a beneficiary can restrain an improvident sale by a trustee.² In the case of *quasi trusts*—courts ordinarily do not interfere by injunction to restrain acts in the exercise of their discretion by managers of clubs, committees, schools, universities—particularly where there is no danger to property.

Illustration (g)—It is only a *settlement* of which there might be specific performance under S. 12 (a) that is entitled to the indirect protection of an injunction as suggested by this illustration: this is the complement to S. 24 (d) and S. 25 (c) here we have the case of one interested under a prior voluntary settlement actively interposing against the settlor to restrain a subsequent contract of sale: The injunction is necessary to prevent an extraneous act in violation of the

1 Att. Gen. v. G, N. Ry. Co. 1 D. & S, 154.

2 Pechel v. Fowler 2 Anstr. 543; Anon 6 Mad. 10.

settlement, under Ss. 24 and 25 that fact merely used as a defence to a suit for specific performance.

Illustration (h)—The principle deducible from decided English cases¹ is that the *contract of service* constitutes a fiduciary relation of the legal adviser and his client and the vakil is bound not to commit a breach of the obligation to observe the strictest confidence in respect of matters coming to his knowledge by reason of employment. He is like a trustee and cannot take advantage of his position.

Illustration (i)—The principle is the same; legal and medical advisers stand in the same degree of *fiduciary relationship*.

Illustration (j)—It relates to *implied covenants restrictive of use* in leases. In case of leases of houses there are often covenants against using the house for particular trades; again in the case of sale or lease there may under certain circumstances be an obligation which ought to be implied for the comfortable or continuous enjoyment of property *in status quo* at the time of the sale or lease, as in this illustration,

Illustration (k)—This is suggested by *Pratt v. Brett*² there a tenant was restrained from sowing the land with mustard and other pernicious seeds, the same being very pernicious to the land and requiring many years to eradicate. This is on the ground of the act causing irreparable damage. A tenant cannot do an act contrary to the usual course of husbandry.

Illustration (l)—In a case between partners injunction is in aid of express covenants or of the duties arising out of the relation of partnership. Injunction is issued though parties could have the remedy of dissolution; if it were otherwise, a person fraudulently inclined might at his will and pleasure compel his co-partner to submit to the alternative of dissolving a partnership or ruin him by continued violation of the

1. *Davis v. Colough*, 8 Sim, 292; *Lewis v. Smith*, M. & G. 417.

2 *Mad.* 62.

partnership contract. But then a court will not grant an injunction in petty cases involving no serious evils and not endangering the future operations of the partnership, *e. g.*, mere differences of temper, casual disputes, minor grievances. Even dissolution is sometimes restrained by an injunction.

Illustration (m)---This is an example of a large class of cases in which a *tenant for life* may be restrained from waste at the suit of the remainderman. The principle of these cases is that where a person has qualified interest in property and another has an interest in the same property on the determination of or subject to the prior interest of the person in possession, the latter is not justified in so dealing with the property as to render the interest of the remainderman less valuable when it falls into possession than it would otherwise have been. Waste is voluntary or permissive: and it may be legal or equitable. This illustration deals with the latter, *i. e.*, such a waste which a prudent man would not do in the management of his property.

Illustration (n)—This is an example of *equitable waste* being restrained as between joint owners of the property. The court will restrain that act which amounts to a destruction of the subject matter, *i. e.*, is in excess of the right of enjoyment he possesses. Injunction is issued because "partition" is not always an adequate relief. Equity will not suffer one co-parcener being allowed to offer to the others a choice between the alternative of submitting either to a partition or to the destruction of the joint property. The court will not however interfere if co-parceners acting *bona fide* and as prudent owners, cannot agree as to what is to be done or omitted.

Illustration (o)—This is an example of the relief by injunction, being applied in a case of *pure trespass*. No injunction is issued if the trespass is temporary and adequate compensation can be obtained for the injury in the shape of damages.

Illustration (p)—This is an example of an injunction

granted after a decision in favour of the *exclusive right*. It is an example of Cl. (e) to S. 54; injunction is necessary to prevent multiplicity of suits.

Illustration (q)—This like illustration (p) is an example of Cl. (e) to S. 54 the object also is to *restrain multiplicity of suits*. The just administration of the assets would be greatly embarrassed if other suits were to be permitted.

Illustration (r) This an example of a trespass under colour of title. In such cases it is necessary on account of the nature of the damage being done by the defendant to grant a perpetual injunction in addition to damages. The question often arises in case of contiguous neighbours of mines, etc., but the court has to use great caution in so doing. It is sometimes granted before the decision of the right in litigation; the court grants it only upon strong probable and pregnant evidence that the parties to be restrained will not suffer in the meantime; it would not grant it if there has been want of diligence on the part of plaintiff. The right of support is one for the protection of which an injunction is an essential relief. That the invasion of such a right where it exists may work irreparable damage and mischief is clear, and besides, prior to a decision upon it, far less inconvenience or probable damage will generally arise from granting than from refusing a temporary injunction. A reasonable probability of damage is sufficient ground for an injunction.

Illustration (s)—This is an example of a class of cases—*Nuisance, i. e.*, cases where one so uses his real property as to invade the common law rights of others in their real property;—in such cases injunction is an indispensable remedy. An injunction was granted to restrain the defendant from manufacturing iron pans in a room adjoining the plaintiff's house¹, but in case of other easements the court looks to the comparative injury caused in point of value and damage.

Illustrations (u), (v), & (w)—These are examples of the

¹ *Hulas Rai v. Sohanlal* (1923) A. I. R. All. p. 443.

classes of cases unconnected with immoveable and sometimes several with any object of moveable property in which the remedy by injunction is applied to prevent an invasion of a right of property which would result in a pecuniary loss to the plaintiff. The plaintiff must prove the existence of a *valid patent* and its infringement by the defendant. In these cases the injunction operates against the defendant's agents and servants: Illustration (v) relates to copyright and (w) to trademark. A trademark is for the purposes of S. 54 treated as property. Injunction is issued even if the user of trademark is innocent. Even exact resemblance is not necessary to give a cause of action.

Illustration (x)—This is an example of a case where one misuses the name of another with a view to his own profit and with the probable result of causing loss to the other but the court interferes only if there is a fraudulent misuse of the name of another. The ground for interference is the danger of loss thus incurred by the person falsely described as being one which he is in fact not.

Illustration (y)—This is an example of a class of cases in which the grant of an injunction is founded on the existence of the ordinary right of property in moveables and not on any right peculiar to the object in question; the *publication of purely private* letters is restrained since the sender of a letter does not thereby give the receiver a right to publish it; beyond the purposes for which the letter was sent, the property therein remains in the sender.

Illustration (z)—This is an example of a class of cases on the subject of the *protection of trade secrets*, of secret inventions and generally of any secret knowledge the disclosure of which will cause pecuniary loss or damage to the owner thereof. The injunction is granted with a view to prevent breach of good faith because it will result in irreparable damage to the plaintiff. This differs from illustration (b) inasmuch as in this case it is necessary not only to prove breach of good faith, but also pecuniary damage.

55. *Mandatory Injunction*—When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the court is capable of enforcing, the court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

ILLUSTRATIONS.

(a) A, by new buildings, obstructs lights to the access and use of which B has acquired a right under the Indian Limitation Act, Part IV. B may obtain an injunction, not only to restrain A from going on with the buildings, but also to pull down so much of them as obstructs B's lights.

(b) A builds a house with eaves projecting over B's land. B may sue for an injunction to pull down so much of the eaves as so project.

(c) In the case put as illustration (i) to section 54, the court may also order all written communications made by B, as patient to A, as medical adviser, to be destroyed.

(d) In the case put as illustration (y) to section 54, the court may also order A's letters to be destroyed.

(e) A threatens to publish statements concerning B which would be punishable under chapter XXI of the Indian Penal Code. The court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B's property.

(f) A, being B's medical adviser, threatens to publish B's written communications with him, showing that B has led an immoral life. B may obtain an injunction to restrain the publication.

(g) In the cases put as illustrations (v) and (w) to section 54, and as illustrations (e) and (f) to this section, the court

may also order the copies produced by piracy, and the trademarks, statements and communications, therein respectively mentioned, to be given up or destroyed.

NOTES

It is a statutory rule that injunction should only be granted when pecuniary compensation would not afford adequate relief, but it does not necessarily *follow* that Court has always power to grant pecuniary compensation for a wrong when injunction is prayed for. Courts have recognised that when issue of mandatory injunction would involve removal of a completed structure which entails inconvenience, and only slight invasion of plaintiff's rights, not committed *wantonly* or after protest, pecuniary compensation is more appropriate relief. But it is not proper for the court to pass a decree which affects a compulsory acquisition of a considerable strap of land under guise of monetary consideration.¹

Nature of a mandatory injunction—This relief is applicable to the breach of any obligation whether arising out of contract or tort. It may be perpetual or temporary, though in very rare cases a temporary injunction of this nature is issued. An injunction is in its nature prohibitory but a mandatory injunction is restitutory and prohibitory. The defendant is first called upon to restore the place to the position in which it was before the act was done and then he is restrained, when he has so restored it, from doing anything in respect of it which would be a breach of obligation on his part. The object in every case is to compel the defendant to restore things to their former condition. The jurisdiction to make such an order has to be exercised with great caution and to be resorted to only where the remedy is inadequate for the purposes of justice and the restoring things to their former condition is the only remedy which would meet the requirements of the case. Where compensation is possible or there has been undue delay, the court will only grant a mandatory injunction to prevent extreme or very serious injury². It will

1 Prasadarayudu V. Laddorai Sowcar. A. I. R. 1936 Mad. 697.

2 Durell v. Pritchard. L. R. 1 Ch. 244; Gaskings v. Ball, 13 Ch. D. 329.

be refused if some other arrangement may be preferred for the benefit of the other party.

Mandatory injunction in cases of contracts—In cases of acts in violation of contract the court looks to the express stipulation of the agreement ; in equity a person who enters into an agreement is bound to a literal performance thereof. The court cannot refuse it on the ground of the inconvenience that would be caused to the defendant by the mandatory injunction,¹ so much so that in *Lloyd v. L. C. D. Ry.*² defendant was not allowed to set up the inconvenience to the public which will arise from his being compelled to perform his agreement ; with all this the court will not grant it if the injury caused by the breach of the obligation is slight or trifling, granting injunction in such a case would be opposed to its object ; it would be inequitable and work extreme hardship on the defendant.

Where a breach of a 'restrictive covenant' cause substantial damage the court has no discretion to award damages in lieu of a mandatory injunction. This rule applies whether the covenant is broken by the original covenantor or by an assignee with notice.³

In *Lane v. Newdigate*⁴ : A leased his land to B for erecting mills and bound himself to supply water thereto from canals and reservoirs on his own land. A impeded the enjoyment of water by B by keeping works out of repair by the use of locks, and by removing stop gate. B asked for injunction which was granted ; in this case even ' affirmative covenants ' were enforced ; the question arises whether such covenants can be enforced against successors of A ; according to *Tulk v. Moxhay*⁵ perhaps they would not be.

1. Lord Manners v. Johnson, 1 Ch. D. 680.

2 2 D. J. S. 579.

3 Achilli v. Tovell (1927) 2 Ch. D. 243.

4 10 Ves. 192.

5 (1848) 78 R. R. 289.

In *Hooper v. Brodrick*¹ : A, tenant for a term of years of an inn was removing the fixtures and was proceeding to close the house and cease to use it as public inn. B asked for an injunction restraining the defendant A from discontinuing during the term of his lease the inn, and to use and keep the house at all reasonable times as an inn, or to take out licenses for the purpose ; the mandatory injunction was refused on the ground that a court had no jurisdiction to compel a party to carry on the business of an inn although it may prevent a defendant from doing such acts as would put it out of his power or out of the power of any one to carry it on.

Mandatory injunction in case of torts—A mandatory injunction is of frequent application in case of torts than of contracts ; the majority of cases falling under this class relate to nuisances or easements. In these cases an injunction compelling the defendant to undo the act proved to be injurious is the only adequate relief ; ordinarily the court gives relief only as to buildings erected after the commencement of the action or after notice given by the defendant objecting to his doing so, but then there is no rule of law preventing a court from granting a mandatory injunction where the injury sought to be restrained is completed before the filing of the suit. The court considers the nature and extents of the damage, and the comparative convenience or inconvenience of granting or withholding it.

*Joychandro v. Beprochurn*² : A and B were co-sharers' owners of certain property. B excavated a tank on a part of the land. A sued for an order that the land on which tank was excavated without A's consent should be restored to its former position ; injunction was refused on the ground that A had not shown any injury by B's act which materially affected his position. The mere fact that the land out of which it had been excavated was fit for cultivation is not an injury of a substantial nature necessitating a mandatory injunction.

¹ 9 L. J. Ch. 321.

² *Joychandro v. Beprochurn*, 14 Cal. 236.

In *Krehl v. Burrell*¹: A despite repeated warnings from the plaintiff B, persisted in building a court yard over which B had a right of way to his shop and refused terms of compensation which B had agreed to accept. Though the building was built at enormous cost it was ordered to be removed.

Trespass—As to when mandatory injunction would issue in case of trespass, by removing encroachment on plaintiff's land, see the case of *Abdul Hussan*.²

Mandatory injunction—Completed structure—Where the defendant built a balcony upon his land so as to overhang the open land of the plaintiffs, and further put a roof over it after receiving notice from the plaintiffs objecting to the encroachment, it was held, in a suit for a mandatory injunction to remove the balcony, that as there was no direct evidence that the defendant had before the notice knowingly committed trespass and as it was not shown that the existence of the balcony would cause such damage to the plaintiffs as would not be compensated by money, substantial monetary compensation would suffice and no mandatory injunction to pull down the structure was necessary³. Civil Courts can in spite of Section 222 of Punjab Municipal Act, can interfere with discretionary orders of commissioners. If their act is arbitrary, capricious, *outrageous* in excess of their power, court can grant injunction.⁴

56. *Injunction when refused*—An injunction cannot be granted—

(a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is

1 7 Ch. D. 55.

2 38 Cal. 687.

3 *La ji Dayal v. Vishwanath Vaidya* (1929) 31 Bom. L. R. 126.

4 A. I. R. Lah. 1946 Page 81 *Administrator of Lahore v. Abdul Majid*.

sought, unless such restraint is necessary to prevent a multiplicity of proceedings ;

(b) to stay proceedings in a court not subordinate to that from which the injunction is sought ;

(c) to restrain persons from applying to any legislative body ;

(d) to interfere with the public duties of any department of the Central Government, The Crown Representative, or any Provincial Government, or with the sovereign acts of a Foreign Government ;

(e) to stay proceedings in any criminal matter ;

(f) to prevent the breach of a contract, the performance of which would not be specifically enforced ;

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;

(h) to prevent a continuing breach in which the applicant has acquiesced ;

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust ;

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the court ;

(k) where the applicant has no personal interest in the matter.

ILLUSTRATIONS.

(a) A seeks an injunction to restrain his partner B, from receiving the partnership debts and effects. It appears that A had improperly possessed himself of the books of the firm and refused B access to them. The court will refuse the injunction.

(b) A manufactures and sells crucibles, designating them "patent plumbago crucibles," though in fact they have never been patented. B pirates the designation. A cannot obtain an injunction to restrain the piracy.

(c) A sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A's Mexican Balm. A sues B for an injunction to restrain the sale. B shows that A's Mexican Balm consists of nothing but scented hog's lard. A's use of his description is not an honest one and he cannot obtain an injunction.

NOTES

Scope of S. 56—This section gives the defences that can be raised to a suit for injunction. It specifies cases where it must be refused; and even if the case does not come within any of the clauses of S. 56, it does not follow that an injunction is to be granted; the court may refuse it in the exercise of its discretion on the ground of delay, hardship, inconvenience, &c. The grounds of defence are general or particular. Cls. (a) to (e) are general grounds of defence to all suits, whereas Cls. (f) to (h) are particular grounds of defence depending on the circumstances of special cases.

Injunction when suit for possession is barred:—It is well established that when it is not open to a person to sue for possession, he cannot be granted any relief in shape of *mere injunction*. Where suit for possession has become *barred* by

time, plaintiff cannot *circumvent* law of Limitation by merely suing for injunction.¹

Practice—Where the actual invasion of a right and other circumstances show that the invasion is likely to continue the proper remedy is an injunction. To say that the plaintiff ought to sue for damages every time that the right is invaded is to drive him to a multiplicity of suits².

Stay of proceedings. Cls. (a), (b), (c)—As a general rule an injunction cannot be granted to stay judicial proceedings pending at the institution of the suit for injunction; the section recognizes one exception to this, *viz.*, when it is necessary to prevent multiplicity of proceedings. There is nothing however to prevent an injunction being issued to stay proceedings that are not pending but are merely in contemplation₃. Cl. (a) of S. 56 has reference to two important prerogatives of the court of chancery in England; (i) right to stay proceedings and (ii) bills of peace; whenever the defendant could show a good defence, the court of chancery formerly used to stay proceedings pending at common Law Courts but that power is now abolished by the Judicature Act of 1873; in India too, the same court administers both Justice and equity and so this old jurisdiction of a court of equity to stay proceedings elsewhere is obsolete. The single exception is however still maintained, *i. e.*, to grant injunction to prevent multiplicity of proceedings—what is known in England as Bills of peace. In England, says *Story*, “Bills of peace may be in two classes of cases; [(i) where the plaintiff after repeated and satisfactory trial has established his right and yet is in danger of further litigation and obstruction to his right from new attempts to controvert and (ii) where there is one general right to be established against several or a number of distinct persons either where one person claims or defends a right

1 *Masjid Shahid Ganj v. Shiromani Gurudwar Parbandhak Committee*, Amritsar. A. I. R. 1938 Lab. 369.

2 *Bai Samrat* 13 Bom. L. R. 905.

3 *White v. Redgrave*, 11 Ch. D. 24; *Prativanath Roy v. Benode Behari Ghose* A. I. R. 1936 Cal. 181.

against many or where if each party sued separately the litigation would be interminable, and hence the injunction." This exception in Cl. (a) is subject to the general proviso stated in Cl. (b)—that under no circumstances can a court restrain proceedings in another court which is not subordinate to it (The order of superiority is as under—Privy Council, High Court, District Court, Subordinate Judge.) According to Cl. (e) proceedings in any *Criminal matter* cannot be stayed by an injunction,¹ but this does not bar interference of the court of equity if the same act which is criminal touches also the enjoyment of property. The court has the power to restrain a person from proceeding at the same time upon the same matter of right in both a civil suit and a criminal prosecution. It will do it on the ground of injury to property.

In re Britton Medical Association,² application for winding up a company having been filed, further proceedings of a criminal nature against the company were restrained.

Appu v. Raman:³ A sued in the court of a sub-Judge for an injunction restraining B from executing the decree of a District Court and obtained it. It was held by the High Court that S. 56, Cl. (b) was no bar, for there were no pending proceedings and besides the injunction was not one to stay proceedings in the court of the District Judge. He had not then applied for execution and its effect was only to prevent him from so applying.

A mortgaged land to B as either agent or benamidar for C. B sued on the mortgage and obtained a decree. C. thereafter sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it and for an injunction restraining A from paying the money to B and B from receiving the money from him. It was held that the plaintiff was entitled to the declaration, but not to the injunction.⁴

¹ *In re Essappa Chettiar* A. I. R. 1942 Mad. 756.

² 52 Ch. D. 503.

³ *Appu v. Raman* 14 Mad. 425.

⁴ *Sethurayar v. Shanwagan Pillai* 21 Mad. 353. See also *Karmadhar v. Hariprasad* 37 Cal. 731 where 14 Mad. 425 has not been followed.

Interfering with functions of Government or legislative body. Cls. (c), & (d).—These are also general like Cls. (a), (b) and (e), but they are based on considerations of public policy : Cl. (c) is in accordance with English practice that courts have no power to restrain a person from applying to parliament or legislative body ; there in certain cases however it is observed that in exceptional cases the chancery court has such power, but the Judges have in no case ventured to exercise the asserted power.¹ Cl. (d) applies only when the act sought to be restrained is by express statute or otherwise one that may be legally done by the particular department of the Government.² It does not follow that an officer of Government cannot be restrained in doing a wrongful act which is a tort. The court cannot interfere even with the sovereign acts of foreign government, nor are contracts of foreign government enforceable by injunction against the property of such Government in England. In *Vansour v. Kruph*³ the court has held to have no jurisdiction to prevent the Mikado of Japan from removing his property in England.

It is has been held in recent Calcutta case that no mandatory injunction can be granted in suit which is bad under Section 306 of Government of India Act and Section 16 of Defence of India Act. If B was aggrieved by order passed by Central Government under Rule 75 (A) of Defence of India Act, it *afforded* him an independent cause of action.⁴

Staying proceedings in a criminal matter. Cl. (e).—Generally the Court will not interfere by way of injunction to prevent criminal proceedings being taken against a defendant to a pending action. Under Cl. 56 (e), a civil court has no jurisdiction to stay by means of a permanent injunction

1 *Steele v. N. Material Ry. Co. L. R. 2 Ch, 237.*

2 *Syed Mazabhai Hussam v. Administrator of Lahore Municipality A. I. R. 1941 Lah. 453.*

3. 9 Ch. D. 351.

4 *A. I. R. 1945 Cal 44 Beldevdas Bajuria and others V Government of United Provinces; Province of Madras V Bodd Paidana. A. I. R. 1941 Mad. 874.*

proceedings in any criminal matter.¹ The principle is that the court will not interfere by way of injunction where the legislature has provided a mode of procedure before a magistrate,

Preventing a breach of contract:—This is clearly a necessary deduction from general principle laid down in Section 54; we have seen that in case of an obligation arising out of contract, rules relating to Specific Performance regulate granting of injunction in such case, whatever would be a defence to *one* kind of suit would be equally a defence to the *other*. Sec. 57 is an exception to this.

As contracts of personal service between a master and a servant cannot be specifically enforced by either party, a dismissed servant's only remedy for a wrongful dismissal would be by an action for damages. He cannot obtain injunction against his dismissal or against the appointment of another person in his place.²

Preventing a nuisance—In England formerly a court did not interfere till it was proved that the act was a nuisance, *i. e.*, the act was committed; but now it does interfere before any actual nuisance is committed if it is satisfied that the act complained of will inevitably result in a nuisance. An injunction is not granted if there is no reason for supposing that there is any danger of mischief or of a serious injury being done suddenly before the interference of the court can be invoked³. The fact that the act may probably prove a nuisance in remote future is no ground for interference. The following observation in *Earl of Ripon v. Hobart*⁴ may be noted:

“ If the thing sought to be prohibited is itself a nuisance

1 *Brj Kumari v. Bama Sundari* 23 Cal. 610; *Calcutta Port Commissioners v. Suraj Mull Jalan* 55 Cal. 978.

2 *Muhmad Mustafa Ali Khan v. District Board Bareilly* (1934) 56 All. 573.

3 *Attorney General v. Sheffield Gas Co.* 3. D. and G. 304.

4 M. and K. 140.

the court will interfere to stay irreparable mischief without waiting for the result of a trial but, where the thing to be restrained is not unavoidable and in itself noxious but only something which may according to circumstances prove so, the court will refuse to interfere till the matter is decided at law. The court would be very slow to interfere where the thing to be stopped may very possibly be prejudicial to none."

Plaintiff's acquiescence is a bar—This ground of refusal is based on the maxim "delay defeats equities." All that we need know is "what constitutes acquiescence" in equity, and what kind of evidence is necessary to prove it. This ground of defence is not recognised freely. It is applicable only when the breach is a continuing one: As said in *Leeds v. Amherst*¹ acquiescence is when a party having a right stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress. "In such a case he cannot afterwards be allowed to complain; but then there can be no acquiescence until that person has knowledge both of the acts committed as of the rights involved. Mere delay is not enough to constitute acquiescence; there should be such a lapse of time as to make it a fraud afterwards to allow the plaintiff to insist on his legal rights. As observed by *Lord Campbell* in² if a party has an interest to prevent an act being done, and acquiesces in it, so as to induce reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." There must however be clear evidence that the plaintiff had full knowledge of his rights. There is no acquiescence if the party is not aware of the violation of his legal rights, or if there is no injury to acquiesce in, or if he acted in ignorance of consequences. Once an act is committed without the knowledge or assent

¹ 2 Ph. 123.

² *Debnassch v. Ali* 8 Ch. p. 314.

above referred to, a right of action has accrued and no lapse of time short of the period of limitation will bar it, though it may be that delay viewed as laches may make the court decline a particular form of relief.¹ The court generally considers two points, the length of the delay and the nature of the acts done in the interval². Acquiescence though it bars an injunction does not necessarily bar compensation³. The court may refuse to grant an injunction if the plaintiff by acquiescence or other conduct has disentitled himself to such relief⁴.

When any other relief is available. Cl. (i)—

This clause repeats the general principle kept in mind by a Court of equity in granting an injunction, *viz.*, whether the plaintiff has any other equally efficacious relief open to him: the only exception being a case of a breach of trust where injunction is granted though there be other remedy. For the reason of this exception, See S. 54 (a). In a suit for declaration that a certain contract entered into between the plaintiffs and defendants was not binding on the plaintiffs, inasmuch as they did not enter into such a contract, and that they were accordingly entitled to an injunction to restrain arbitration, it was held that the injunction claimed should not be granted in view of this clause.⁵ The plaintiff's suit for an injunction to prevent the defendant from selling property to another person which he had agreed to sell to the plaintiff was dismissed as not competent,⁶ the remedy by way of a suit for damages being open to him.

1 Wood v. Sutcliffe 2 Sim. 163.

2 Cairncross v. Lorimer 7 Jur. N.

3 Lindsay Petroleum Co. v. Durr L. R. 5 P. C. 239.

4 Sir. Hukum Chand v. Maharaj Bahadur Singh (1933) 35 Bom. L. R. 997 (P. C.)

5 Ram Kissen v. Pooranmull 47 Cal. p. 733; Attarsingh Bahamsing v. Vishadas, A. I. R. 1937 Lah 545.

All India Groundnut Syndicate Ltd. 47 Bom. L. R. 420,

6 Sardari Mal v. Hirda Nath (1925) 6 Lah. 384.

Scavenging work—Doing *scavenging* work is not a trade or profession involving skill. The right to do scavenging work in certain houses and exclude others from doing so, cannot be recognised by court.¹

✓ **Inequitable conduct of the plaintiff.** Cl. (j).—This ground of defence is based on maxims : “ He who seeks equity must do equity ” and “ He who comes to equity must come with clean hands. ” It is open to court to refuse an injunction where the state of things complained of is the outcome of the plaintiff's own conduct, and where he does not satisfy the court that his own acts and dealings in the matter have been fair and honest.² A municipal committee had refused to grant permission to person to build certain structure. The person subsequently induced committee to grant permission on condition that he paid certain sum of money to committee. Committee passed resolution accepting offer but when he refused to pay, served a notice upon him to demolish. Plaintiff brought a suit for injunction against demolition held plaintiff was not entitled to any relief.³

The three illustrations appended to this section are all examples of this clause. Illus. (a) is based on the general principle that a partner who complains that the other partners do not do their duty towards him must be ready at all times and offer himself to do his duty towards them. Illustration (b) and (c) relate to trade marks : as, to trade marks the rule is that if a trade mark represents an article as protected by a patent when in fact it is not so protected, such a statement *prima facie* amounts to a misrepresentation of an important fact, which would disentitle the owner of trade mark to relief against any one who pirated it; in such a case it can make no difference whether the protection

1 1938 M. W. N. 805 *Raghodu v. Sarraiya*.

2 *Seni Chetter v. Santhanathan* 20 Mad. 58.

3 *Beshashwar Nath v. Municipal Committee, Mogli*, A. I. R. 1940 Lah. 69.

never existed or ceased to exist. In *Flavel v. Harison*¹ the plaintiff was selling a stone which he falsely described as patent and an injunction was refused; so also in *Pidding v. How*² where plaintiff sold mixed tea under the name of "Howquas" mixture, but in his advertisement he made false statements to the public; and he was refused injunction against another selling tea under the same names. But of course mere puffing recommendation will not debar the plaintiff of his right.³ ✓

Plaintiff having no interest in the subject-matter. Cl. (k)—To justify a right to an injunction the plaintiff must have real interest in the subject-matter. His suit must not be a mere imposition on the court. This clause would apply if a person buys a share in a company simply for the purpose of instituting a suit which he does not for his own benefit or of that of the share-holders but of that of a rival company whose puppet he might be; on these grounds injunction was refused in *Forrester v. Manchester Ry. Co.*⁴ Test is—Is he a nominal plaintiff another having a real personal interest in the suit?

Every taxpayer is directly and personally interested in the proper application of the fund of the Municipality and therefore any taxpayer may sue the Municipality for an injunction restraining the Municipality from misapplying its funds.⁵

The plaintiff must show some special damage or injury. Mere sanction of building plan by municipality is not enough.⁶ In Nagpur case it was held that in a suit for restraining building of a house, it is incumbent upon plaintiff to show some special damage. The mere fact that municipal committee acted beyond its powers in granting sanction for construction of a house is not sufficient.⁷ //

1 10 Haro 457. | 2 8 Sim. 477. | 3 Holleway, 13 Beav. 389.

4 Jur. N. S 837. | 5 Vaman v. Municipality of Sholapur 22 Bom. 646

6 Parakh v. Rudia 1941 Nag. 266.

7 Cowasbah Bonanji v. Praful Nath A. I. R. 1941 Nag. 364.

57. *Injunction to perform negative agreement*—
Notwithstanding S 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement : provided that the applicant has not failed to perform the contract so far as it is binding on him.

ILLUSTRATIONS.

(a) A contracts to sell to B for Rs. 1,000, the good will of a certain business-premises and further agrees not to carry on that business in Calcutta. B pays A the Rupees 1,000, but A carries on the business in Calcutta. The Court cannot compel A to send his customers to B, but B may obtain an injunction restraining A from carrying on the business in Calcutta.

(b) A contracts to sell to B the goodwill of a business, A then sets up a similar business close by B's shop and solicits his old customers to deal with him. This is contrary to his implied contract and B may obtain an injunction to restrain A from soliciting the customers and from doing any act whereby their goodwill may be withdrawn from B.

(c) A contracts with B to sing for 12 months at B's theatre and not to sing in public elsewhere. B cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A from singing at any other place of public entertainment.

(a) B contracts with A that he will serve him faithfully for twelve months as a clerk. A is not entitled to a decree for specific

performance of this contract. But he is entitled to an injunction restraining B from serving a rival house as clerk.

(e) A contracts with B that, in consideration of Rs. 1,000 to be paid to him by B on a day fixed, he will not set up a certain business within a specified distance. B fails to pay the money. A cannot be restrained from carrying on the business within the specified distance.

NOTES.

Scope—This section embodies the principle laid down in the leading case of *Lumly v. Wagner*¹ where the facts were as in illus. (c). It is an exception to the general rule in S. 56 (f), to the effect that there can be no injunction where there can be no specific performance. This section is limited only to cases of obligations arising out of contract. We get from S. 16 that where the contract is divisible, *i. e.*, one part stands on a separate and independent footing from another part, the court will enforce specific performance of that part which is capable of specific performance although the other cannot be. The reason of the rule being that in such a case the parts are in themselves independent contracts; the same analogy, it should be noted, applies to S. 57—relating to granting of injunctions. It would therefore be correct to say that S. 57 is to injunctions what S. 16 is to specific performance. All that is necessary is that:—

- (i) there should be 2 agreements,
- (ii) they must be divisible,
- (iii) the negative agreement may be express or implied,
- (iv) the applicant must not have failed to perform the contract so far as it is binding on him.

If so, the breach of the negative one is restrained—*i. e.*, a part of the agreement is enforced through the affirmative part, *i. e.*, the other part cannot be specifically enforced.

The contract must be comprising 2 agreements.—To bring a case within S. 57 there must be two

agreements—one affirmative and the other negative; the negative one may be express or implied; each part must be based on valid consideration; where parts are distinct, and separable from the rest the court itself imports a negative term if it is not expressly stated therein. In that case there must be at least an express negative purpose to support the implied negative term¹. This negative part must constitute a distinct separate and substantive part of the contract. It will not be enforced by an injunction, if it is merely subsidiary or incidental to the affirmative, or if the affirmative and negative covenants being correlative are not separable from each other. In that case the enforcing of the negative covenant depends upon whether the affirmative one is capable of being specifically enforced; *i. e.* S. 57 will not apply². In England the modern tendency is to limit the doctrine of *Lumly v. Wagner* to contracts of such a nature as are the proper subjects of equitable jurisdiction and it refuses to imply negative terms except in cases where courts have already done so. In India too the tendency is in the same direction.

Inability to enforce specific performances of affirmative part—This section is not restricted to any particular ground of inability of the court; it applies whatever be the reason for not specifically enforcing the affirmative part of the contract; S. 21 gives us the cases where the court would not enforce specific performance of the contract; S. 57 would apply to cases of negative covenants where the affirmative part would come under the bar of any of the nine clauses of S. 21, *e. g.*, if the contract of exclusive service is of more than 3 years; in such a case there would be no specific performance because of S. 21, Cl. (f); but still the breach of the negative part, *i. e.*, not to serve any one else for that period will be prevented by an injunction under S. 57³.

It has been held in recent Bombay High Court ruling that "Agreement of service, containing a negative covenant preventing employee from working elsewhere during the

1 J. State Newspaper Co. (1899) W. N. 114.

2 Hill Croft 2 Ph. 60.

3 Madras Ry. Co v. Rust. 14 Mad. 18.

terms covered by the agreement, are so known to Indian Courts." In this ruling prior decisions were referred to and Mr. Despande, ex. weaving master was restrained from serving in British India or in Native State for the period of 3 years as per agreement. It was further held in this case that negative covenants do not render it void on ground of restraint of trade. From illustration given in clause (C) and (D) of Section 57 it is clear that our Specific Relief Act does recognise such negative covenants and they are enforced by court of law strictly.¹

The applicant must not have failed to perform his part of the contract—It is not invariably necessary that he must have actually performed it; it is enough if he is willing to do it; but till he does it, the injunction will be conditional; the injunction will be dissolved the moment he fails to perform his part of the contract, which was the consideration for the negative term.² This is exemplified by *Illus. (e)*.

Contracts of personal service—By an agreement made in England *M* was engaged by B and Co., a firm of engineers in Calcutta, as an assistant in their firm for a period of 5 years and it was *inter alia* agreed that "he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." During the term of his engagement *M* left the employ of B and Co., and entered that of another firm. On a suit filed by B & Co., for an injunction restraining *M* from serving elsewhere it was held that though there was no negative covenant in terms in the agree-

V. N. Despande v. Arvind Mills Co. Ltd., 48 Bom L. R. p. 90;
Jairam v. Indian Iron and Steel Ltd., A. I. R. 1940 Cal. 466;
Parma Singh v. Tushi Abharam Goswami I. L. R. (1937) 2, Cal.
 367=41 C. W. N. 794.

Peto v. Brighton Ry. Co., 1 H. & M. 468; *Fletcher v. Montgomery* 33 Beav. 26.

ment. A negative covenant could be properly implied under S. 57 of Specific Relief Act and ill. (d) thereto.¹

Joint stock companies. A joint stock company cannot be restrained by injunction from dismissing its managing agent even though the contract of service provides that he is to be removed after a specified period the only remedy of the agent in case of wrongful dismissal is a suit for damages².

*Cases—Clarke v. Price*³. There was simply an affirmative agreement by a barrister to prepare reports of cases for a certain publisher, the publisher wanted an injunction to restrain him from composing reports for others; it was refused because there was no such negative agreement.

In *Hills v. Croll*⁴. A contracted with B to supply B with all the goods of a particular kind from his manufactory and B contracted not to buy any such goods elsewhere: injunction, against B was refused because the two causes were correlative, the one was a corollary to the other and were not separate and divisible.

In *Fletcher v. Montgomery*⁵. A engaged B who, was a provincial actor to act at his theatre in London for a certain period; B came to London and was willing to act for A. But though A paid B his salary, he kept him idle for five months and then B engaged himself to act elsewhere. A sued for injunction; it was refused on the ground that A had failed to perform his part of the contract; mere payment of salary would not be a sufficient performance.

Recent English authorities⁶ do not go as far as illustration (d) where a negative agreement is not express but implied.

1. *Burn & Co. v. Mac Donald* 36 Cal. 354; See also *Charlesworth v. MacDonald* 23 Bom. 103; *Callianji v. Narsi* 19 Bom. 764—(where an injunction was not granted restraining the defendant from serving as a cutter elsewhere).

2. *Sircar v. Balrahmi Coal Co.* 16 C. W. N. 289.

3. 2 Wills. 157.

4. Ph. 60.

5. 13 Beav. 36.

6. *Whitwood Chemical Co. v. McGregor* (1891) 2 Ch. 416; *Metro politan Electric Supply Co. v. Ginder* (1901) 2 Ch. 799 *Mortimer v. Beckett* (1920) 1 Ch. 571.

APPENDIX A.

SUMMARY.

Definitions.

"*Obligation*" includes every duty enforceable by law. "*Settlement*" means any instrument other than will or codicil whereby the destination or devolution of successive interests, in moveable or immoveable property is disposed of or agreed to be disposed of. The term "*obligation*" is used in its juridical sense to include every duty springing out of contract or tort. In English Law this term is used in a limited sense as connoting only duties arising on contract.

Saving Clause.

This Act does not, unless where expressly enacted—

(i) Give any right to relief in respect of an agreement which is not a contract, *i. e.*, there can be no relief in respect of void agreements.

(ii) Deprive any person of any right to relief other than specific performance which he may have under any contract, *i. e.*, right to alternative relief is not lost. The Act does not restrict a person to a particular relief. But he must not seek it so as to come under the bar of S. 29.

(iii) Affect the operation of S. 49 of the Registration Act on documents.

"Specific Relief"

At law, the ordinary relief is by way of *damages* so far as civil wrongs are concerned; this is the *general relief*; as opposed to that the different reliefs provided for by this Act are called *specific*, inasmuch as they lie outside the ordinary order of legal redress.

Modes of Relief (S. 6.)

It can be given in any of the following ways:—

(1) By taking possession of certain property and delivering it to the claimant (Ss. 9 & 11-).

(2) By preventing a party from doing an act which he is under an obligation not to do, *i. e.*, injunction (Ss. 52, 57)—negative relief.

(3) By ordering a party to do the very act which he is under an obligation to do (Ss. 12 & 30), *viz.*, specific performance of contracts: *mandamus* (Ss. 45 & 51).

(4) By determining and declaring the rights of parties otherwise than by an award of compensation. *e. g.*, declaratory decree, rescission, rectification (Ss. 31 to 43).

(5) By appointing a receiver (S. 44).

Specific relief cannot be granted to enforce a penal law.

The real object of giving specific relief is to protect some civil right of a person or to protect a wrong being done to him.

Possession of immoveables.

Under S. 9 a person who is dispossessed without his consent of immovable property otherwise than in due course of law, may himself, or any other person claiming through him may, by a suit instituted within 6 months from the date of dispossession, recover possession thereof, notwithstanding any title that may be set up in such a suit. In such a suit the court has not to go behind the fact of possession and has not to determine title. Such a suit cannot be brought against Government. There is no appeal against or review of the decree passed in such a suit; but an *ex parte* order can be set aside. The only remedy of the aggrieved party (one ejected) is to bring a regular civil suit to establish his title to the property and for recovery of the possession.

The object of section 9 is to discourage people from taking the law in their own hands however good their title may be. It provides for the summary removal of any one who dispossesses another whether peaceably or otherwise than by due course of law. This section is based upon the old English Assize of Novel Disseisin.

Thus section contemplates cases *de facto* and legal possession: it must be one founded in right, *i. e.*, not mere recent possession of a trespasser or mere physical possession or

occupation of land suddenly taken and not acquiesced in, the court can consider the question of title so far as is necessary to decide whether the person alleging dispossession was in juridical possession as between the plaintiff and the defendant. The High Courts hold different views on this point; according to the Bombay and Allahabad High Courts, a suit may be brought even after 6 months on the proof of prior possession alone, whereas the Calcutta High Court has held that S. 9 bars a person from recovering possession on the mere ground of prior possession unless the suit was brought within six months of dispossession.

Dispossession must be physical; merely telling a tenant not to pay rent is not enough.

Specific delivery of moveables (S. 11).

It will be ordered by the court on a suit brought by the person entitled to immediate possession:—

(1) If the thing claimed is held by the defendant as agent or trustee of the claimant. It is not necessary that the thing should have a peculiar intrinsic value, sufficient it is if a fiduciary relation exists between the parties.

(2) When compensation in money would not afford the claimant adequate relief for the loss of the thing claimed.

(3) When it would be extremely difficult to ascertain the actual damage caused by its loss, *e. g.*, in case of chattels of unique value—articles of curiosity, family inscriptions, heirlooms, ancient inscriptions; in case of such moveables it is very difficult to measure the loss in money and hence specific delivery is decreed; so also if the shares be of private companies not easily obtainable in the market, but not so in the case of sale of public stocks.

(4) When the possession of the thing claimed has been wrongfully transferred from the claimant.

Meaning of "specific performance."

"Specific performance" is equitable relief given by the court in cases of breach of contract, in the form of a judgment that the defendant do actually perform the contract according to its terms and stipulations (Halsbury Vol. 27, P. 3);

What contracts can be specifically enforced (S. 12).

This is at the discretion of the court; but generally it would be if:—

(1) The act agreed to be done is in the performance wholly or partly of a trust. The very act or thing which the contract provides has to be done *in specie*.

(2) When there is no standard for ascertaining the actual damage caused by non-performance of the act agreed to be done, *i. e.*, when the subject-matter has a conjectural value not ascertainable, *e. g.*, in case of peculiar chattels of antiquity, curiosities, agreement to retire from business, to sell two ancient China jars or not to carry on the same trade.

(3) When the act agreed upon is such that pecuniary compensation would not afford adequate relief; unless and until the contrary is proved, the breach of a contract to transfer immoveables is presumed to be such as cannot be adequately compensated by damages, while that for moveables can be; thus in case of immoveables specific performance has become a rule as it were; while in case of moveables an exception merely, except in cases falling under S. 11. Contracts to convey public stock will not be specifically enforced because compensation in money would afford adequate relief, they being easily procurable in the market without a material change in the price; but shares in private Companies not being so obtainable have to be specifically delivered over.

(4) When pecuniary compensation cannot be got for the non-performance of the act, *e. g.*, contract for personal acts, covenant to lease, to endorse a bill, settle boundaries, &c.

In equity specific performance of a contract is enforced on the ground of the inadequacy of damages recoverable at law.

A court will not decree specific performance of illegal or immoral contracts, *e.g.*, a prospective separation agreement or if the agreement is without consideration, or revocable or determinable at will.

Contracts which cannot be specifically enforced (S. 21.)

(1) Those for the non-performance of which compensation would be an adequate relief, *e.g.*, those for borrowing and lending money, to sell government stock, &c.

(2) That which runs into such minute or numerous details, or which is dependent on the personal qualifications or volition of the parties or otherwise from its nature is such that the Court cannot enforce specific performance of its material terms.

Illus.—(i) Contracts to render personal service.

(ii) Contracts to do acts involving special skill, *e.g.*, painting a picture, or by an author with a publisher to write a literary work.

(iii) Agreement to build and repair. It is specifically enforced only where it is definite in its nature and the plaintiff has no other remedy.

(iv) Agreement to marry.

(v) Contracts without consideration, *i. e.*, merely voluntary agreements.

(vi) If there is no mutuality, *i. e.*, if the remedy is not reciprocal and mutual.

(vii) Agreement to sell the goodwill of a business apart from business.

(3) A contract the terms of which cannot be fixed with certainty.

(4) A contract which is in its nature revocable, *e. g.*, one to enter into a partnership which does not specify the duration thereof.

(5) A contract made by the trustees in excess of their powers or in breach of the trust.

(6) A contract which involves the performance of a continuous duty extending over a longer period than 3 years from its date. In *English Law* there is no specific period; it is sufficient if the performance of the duty extends over a considerable period. This does not apply to negative covenants.

(7) A contract of which a material part of the subject-matter supposed by both parties to exist has *before* it has been made ceased to exist. This differs from S. 13 whereby provision is made for the subject-matter ceasing to exist after it is made.

(8) A contract made by or on behalf of a corporation or public company created for special purposes or by the promoters thereof in excess of its power, *i.e.*, for objects foreign to it.

(9) A contract to refer a controversy to arbitration shall not be enforced save as provided by the Civil Procedure Code : but the existence of such a contract bars a suit in respect of subjects agreed to be so referred. There must be a distinct refusal to perform that contract ; the mere filing of the plaint is not a distinct refusal. It must be before action is brought. The contract must be really operative and not one broken up by the conduct of the parties thereto.

This clause covers contracts to refer any matter which can be legally referred to arbitration—even a pending suit.

Nature of Court's jurisdiction (S. 22).

It is altogether discretionary and not a matter of right of the parties. A court is not bound to grant specific performance even if it be lawful to do so ; however this discretion is not to be arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal. Each case depends upon its own circumstances.

(1) If the circumstances are such as to give the plaintiff an unfair advantage over the defendant, than though there be no fraud nor misrepresentation on the part of the former, the court will not decree specific performance. A court of equity will not interfere if both the parties were at the time of making the contract on equal terms *i.e.*, had equal means of knowledge, though their relative position might subsequently turn out to be different from what they supposed it to be. Unfairness need not be intentional ; unfairness is not to be judged by subsequent events ; it must be at the time the contract is entered into.

(2) If the performance of the contract would involve a hardship on the defendant which he could not foresee, whereas its non-performance would involve no hardship on the plaintiff, the court will not interfere. "He who comes into equity must come with clean hands." A court relieves a defendant against hardship though there may be no improper conduct on the part of the plaintiff. It does not mean mere improvidence or inadequacy ; it means that the transaction should be unconscionable such that its performance would be

inequitable. A court will not help a defendant if he has brought it about himself or because the object he had in view in entering into the contract has become impossible. It must be such as the defendant could not foresee. No relief can be given if the parties cannot be placed in *status quo*.

But if the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance, the court would decree it ; in such cases a court of equity always does its best to get the agreement carried out.

Specific performance of part. (Ss. 14, 15, 16 & 17).

If at all, the contract must be performed in its entirety. As a general rule, a court of equity will not direct specific performance of a part of contract : but certain exceptions to this are recognized by Specific Relief Act Ss. 14, 15 and 16. Thus if a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed bears only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party direct the specific performance of so much of the contract as can be performed and award compensation in money for the deficiency. But if the part which must be left unperformed forms a considerable portion of the whole or does not admit of compensation in money, the party in default is not entitled to obtain decree for specific performance ; the court however may at the suit of the other party direct the party in default to perform specifically so much of his part of the contract as he can perform provided that the plaintiff relinquishes all claim to further performance and all rights to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendant (Ss. 14 and 15). When a part of a contract which taken by itself can and ought not to be specifically performed, the court may direct specific performance of the other part (S. 16). In no other cases is a part only of a contract to be specifically enforced (S. 17).

The reason of the rule is that a mere difference in quantity has never been held by a Chancery Court to be a bar to specific performance. It draws a distinction between the essential and non-essential terms of a contract—and allows incapacity to perform its non-essential term to be made the subject of compensation.

The illustrations to this are to be had in case of contracts where there is a stipulation as to time, or where there is a misdescription of property : where the time is of the essence of contract and the stipulation is broken the defaulter cannot get specific performance of the rest of the contract ; but the promisee if he elects to have the specific performance thereof, can do so if he gives up all claims to further performance and the rights to compensation, if it is not of the essence of the contract.

Time when of the essence of contract.

In England prior to the Judicature Act of 1873, time was always of the essence of the contract at *law* ; but was not invariably so *in equity*. Now both at law and equity, lapse of time is a bar to specific performance if ;—

- (1) It was originally expressly so stipulated.
- (2) It was so from the nature of the transaction.
- (3) It was made so subsequently by a reasonable notice.
- (4) If delay is so great as to be evidence of abandonment of the contract.

S. 13 of the Specific Relief Act. S. 56, Indian Contract Act distinguished.

S. 13 of the Specific Relief Act says that notwithstanding anything contained in S. 56 of the contract Act, a contract is not wholly impossible of performance because a portion of its subject matter, existing at its date has ceased to exist at the time of performance ; thus if A contracts to sell a house to B for Rs. 1,000 and a day after the contract is made, the house is destroyed by fire, B may be compelled to perform his part of the contract by paying the purchase money. This section at first sight seems to be in conflict with S. 56

of the Contract Act ; but it is not really so. That section speaks of an agreement to do a thing impossible in itself or which becomes impossible afterwards by any causes beyond the control of the parties ; while the object of S. 13 of the Specific Relief Act is merely to explain the bearing of the general rule as in S. 36 of the Contract Act upon a suit for specific performance. Further S. 13 is limited to cases where an act has become impossible because part of the subject matter has ceased to exist and does not extend to cases where it becomes unlawful.

This section does not lay down any rule as to the validity or otherwise of a contract. This section presupposes that the agreement must be one enforceable at law. This is not meant to enable a person to call upon another to do an act which he is not competent to do as being against public policy. The principle underlying this is, that a party making an unqualified promise must stand by it. The effect is to throw the loss on the equitable owner. The principle would apply to a contract for the sale of shares in a company which is afterwards wound up before the shares are actually transferred.

Remedies against a vendor with imperfect title.

S. 18 concede to a purchaser or lessee of property some rights against a vendor with imperfect title thus:—

(1) If the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him or a person claiming under him to make good the contract out of such interest.

(2) Where the concurrence of other persons is necessary to validate the sale or lease and they are *bound* to convey it at the lessor's request, the purchaser or lessee may compel him to procure such concurrence.

(3) Where the vendor professes to sell unincumbered property but the property is mortgaged for an amount not exceeding the purchase money and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee. This clause assumes that the vendor has represented the

property to be unincumbered ; the representation may even be implied. No relief under this clause can be allowed if the transaction between the parties is complete.

(4) Where the vendor or lessor sues for specific performance of the contract and the suit is dismissed on the ground of his imperfect title, the defendant has a right to the return of his deposit with interest thereon, and his costs of suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

Liquidation of damages no bar to Specific Performance.

The fact that a sum is mentioned as the amount to be paid in case of its breach and that the party in default is willing to pay the same, is not a bar to specific performance if the contract is otherwise proper to be specifically enforced.

This section embodies the modern general rule of equity that a thing ought to be done though penalty or liquidated damages are mentioned. But it will not apply where compensation in money would be adequate relief.

For whom contracts can be specifically enforced (S. 23)

Specific performance of a contract may be enforced in favour of:—

(1) A party thereto.

(2) Representative in interest, or the principal (though undisclosed) or any party thereto ; but not if the case falls under Cl. 2 of S. 21, or there is a provision in the contract that his interest shall not be assigned unless where his part of the contract has already been performed.

(3) Any person beneficially entitled (when the contract is a settlement on marriage or a compromise of doubtful rights between members of the same family).

(4) The Remainderman (when the contract has been entered into by a tenant for life in due exercise of power).

A remainder is an ulterior estate limited to take effects and to be enjoyed after a prior estate is determined, both estates being created at the same time. It arises out of express grant;

the person taking such estate is a remainderman ; reversion is something different arising by implication. It is the residue left in the grantor to commence into possession after the determination of a particular estate.

(5) A reversioner in possession (when the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such a covenant.)

(6) A reversioner in remainder (when the agreement is such a covenant and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach.)

(7) The amalgamated Company (if a public company has entered into a contract and has subsequently become amalgamated with another public company.)

(8) The company (when its promoters have before its incorporation, entered into a contract for its purposes—if the contract is warranted by the terms of its corporation.) (S. 23); This does not apply to contracts to take shares but only to contracts for the working purposes of the company; the promoters are not the agents of the company before its formation.

Specific performance cannot be enforced in favour of.—

(1) One who could not recover compensation for its breach.

(2) One who has become incapable of performing or violates any essential term of the contract that on his part remains to be performed, *e.g.*, insolvency.

(3) One who has already chosen his remedy and obtained satisfaction for the breach (*e.g.*, recovered compensation).

(4) One who (before the contract) had notice of the settlement of the subject-matter thereof having been made. It is immaterial even if it is not founded on a valuable consideration ; it is enough if it is in force. It must be an executed settlement and not executory. This clause protects a settlement as against a subsequent purchaser for value with notice of the settlement, whereas S. 25 (c) protects it as against the settlor himself by refusing him specific performance of his subsequent contract for value with a third person.

(5) A vendor or lessor of moveable or immoveable property—

(a) Who knowing himself not to have any title to the property has contracted to sell or let the same.

(b) Who cannot give a title free from reasonable doubt, though he entered into the contract believing that he had a good title. The title which the purchaser may require is only such title as the conditions of sale entitle him to, and where the title depends for its validity upon proof of the seller not having had notice himself of an encumbrance when he completed his own original purchase, the title is "a good holding title."

(c) Who (before the contract) had made a settlement of the subject-matter thereof, even though it be not founded on a valuable consideration. (Ss. 24 & 25).

When contracts cannot be specifically enforced except with a variation.

S. 26 makes provision for cases where if a defendant sets up a variation in defence to the plaintiff's suit for specific performance it will be had only with the variation so set up, *viz.*

(1) Where by fraud or mistake of fact the contract (of which specific performance is sought) is in terms different from that which the defendant supposed it to be when he entered into it. The contract must be a complete one and not merely contingent.

(2) Where by fraud, mistake of fact, or surprise the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff.

(3) Where the defendant knowing the terms of the contract and understanding its effect has entered into it relying upon some misrepresentation by the plaintiff or upon some stipulation on the plaintiff's part which adds to the contract but which he refuses to fulfil.

(4) Where the object of the parties was to produce a certain legal result which the contract as framed is not calculated to produce.

(5) Where the parties have subsequently to the contract contracted to vary it.

In such cases the plaintiff has to elect between having his action dismissed or having judgement with the variation set up. The contract must be one and in writing.

There is this difference between a plaintiff seeking and defendant resisting specific performance.

A plaintiff seeking specific performance cannot himself adduce oral evidence in order to obtain that with a variation; but the defendant resisting it can go into oral evidence to show that by fraud, mistake of fact &c., the written agreement does not express the real terms.

The persons against whom contracts may be enforced (S. 27.)

(1) A party thereto.

(2) A person claiming under him by a title arising subsequently to the contract, except a transferee in good faith for value and without notice.

(3) A person claiming under a title which though prior to the contract and known to the plaintiff might have been displaced by the defendant.

(4) The amalgamated Company where the public company which has entered into a contract becomes amalgamated with another public company.

(5) The Company where the promoters thereof have before its incorporation entered into a contract warranted by the terms of the incorporation and ratified and adopted by the company.

Specific performance in case of part performance of contract to lease (S. 27-A).

Where a contract to lease immoveable property is made in writing signed by parties thereto; either party may, notwithstanding that the contract, though required to be registered, has not been registered, sue the other for specific performance of the contract.

In the case of specific performance claimed by the lessor, he must have delivered possession of the property to the lessee in part performance of the contract—

In the case of specific performance claimed by the lessee,
(1) he must have in part performance of the contract taken

possession of the property or, (2) being already in possession, continues in possession in part performance of the contract, and has done some act in furtherance of the contract.

Nothing, however, shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof.

Against whom not enforced (S. 28).

A contract cannot be enforced against a person under circumstances mentioned in S. 28, *e. g.*, when consideration is grossly inadequate, consent has been obtained by misrepresentation, concealment, circumvention, unfair practices of the other party or assent is given under mistake of fact, misapprehension or surprise.

Defences to an action for specific performance.

(1) That the circumstances of the case are such as to give the plaintiff unfair advantage over the defendant though there is no fraud or misrepresentation (S. 22-a).

(2) That specific performance would involve a great hardship on the defendant if enforced, and would not involve such hardship on the plaintiff if not enforced (S. 22-b).

(3) That the plaintiff has not performed the whole of his part of the contract and that the part left unperformed forming a considerable portion of the whole does not admit of compensation in money (S. 14).

(4) That time was of the essence of the contract and the stipulation is broken.

(5) That the misrepresentation of the subject-matter was material and substantial (Ss. 14 & 15).

(6) That the plaintiff could not give a title free from reasonable doubt (S. 25).

(7) That the plaintiff had already chosen his remedy or that he could not recover compensation for the breach or that he failed to perform an essential term of the contract that remained on his part to be performed (S. 24).

(8) That he had previously to the contract known that a settlement of the subject-matter was made and was in force (S. 24).

(9) That the consideration to be received by him was grossly inadequate (so as to be evidence of undue advantage taken by the plaintiff). (S. 28-a).

(10) That his assent to the transaction was given under influence of mistake of fact, mis-apprehension or surprise (S. 28-b).

(11) That his assent to the transaction was obtained by misrepresentation (innocent or wilful) concealment, unfair practices of the other party.

(12) That the contract came under any clauses in S. 21 which could not be specifically enforced.

(13) A variation may be pleaded under S. 26.

(14) That there was want of mutuality; but it is not a defence in India.

Mistake how relieved.

(1) Specific performance may be had with a variation (S. 26).

(2) Specific performance may not be had against a person if the assent was given under a mistake of fact (S. 28).

(3) Rectification of the instrument can be had if it is mutual; oral evidence is admissible to prove the mistake (S. 31).

(4) Rescission of a contract may be allowed (S. 35).

(5) Cancellation of the instrument would be ordered (S. 39).

Damages and specific performance.

A person suing for specific performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance. The Court has the discretion to grant either relief or both (S. 19).

The court can award compensation for the breach of the contract; the mere circumstance that the contract is incapable of specific performance will not preclude the court from exercising its jurisdiction to award damages. In England similarly the court has the power under the Judicature Act.

Effect of dismissal of suit for specific performance.

The party whose suit is dismissed is barred from bringing any suit for compensation for the breach of the contract (S. 29).

Enforcing Awards.

Awards and wills are specifically enforced just like contracts and Ss. 12 to 29 of the Act apply (S. 30).

Rectification (Ss. 34-37).

Rectification is entirely at the discretion of the court. To get this relief it is necessary that the mistake (either of fact or law) should be *mutual* or that there should be fraud, and such fraud or mistake must have resulted in the contract or other instrument in writing, not truly expressing the intention of the parties. Either party or his representative in interest may institute such a suit; but the court will interfere only on a clear proof of the fraud or mutual mistake and after ascertaining the real intent of the parties; it must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement; the court will then rectify the instrument so as to express the true intention so far as that can be done without prejudice to the rights acquired by third parties acting in good faith and for value. Thus there can be no rectification against a purchaser for value without notice. In order to ascertain the true intention of the parties, the court may inquire as to what the instrument was intended to mean and what were intended to be its legal consequences; the court is in no way to confine to the inquiry as to what its language was intended to be.

We noted that the mistake must be mutual; if it is that of one of the parties only it will be a ground not for rectification but rescission under S. 35 or for setting up a variation under S. 26.

The relief is based on the maxim "He who comes into equity must come with clean hands" applies; *i.e.*, both parties must be innocent, *i.e.*, did what neither of them intended to do; this section does not apply to intentional omissions.

The relief is not limited to contracts only; any instrument in writing, *e. g.*, wills, deeds, can be rectified.

If the original agreement is ambiguous extrinsic evidence is admissible to ascertain the true intention of the parties.
When a Contract can be allowed to be rescinded (Ss. 35-38).

S. 35 empowers a court of equity to adjudge rescission of a contract (at the suit, of any person interested in the contract in writing, for its rescission).

(1) If the contract is voidable or terminable by the plaintiff; *i. e.*, in case of contract induced by coercion, undue influence, fraud, misrepresentation, under Ss. 15-18 (Indian Contract Act). It must be terminable by the plaintiff only and not by both the parties. *i. e.*, it must not be void altogether. A contract is said to be terminable when it reserves to the contracting parties—one or both, a power in certain specified circumstances to rescind the contract.

(2) If the contract is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff; the accident, mistake or fraud which is pleaded must be such as would go to the bottom of the contract radically affecting its merits and not such as to admit of a rectification.

(3) If the decree for specific performance of a contract of sale or of a contract to take a lease, has been made and the purchaser or lessee makes default in payment of the purchase money or other sums which the court has ordered him to pay.

This is at the discretion of the court and not obligatory upon it; the mere fact that the requirements of the section are satisfied is not conclusive. If it thinks proper it may award compensation to the other party and ask the person in whose behalf it is so rescinded to pay the same. A party may in his suit for specific performance put a prayer for rescission in the alternative.

Mere inadequacy of price is not of itself a defence to a suit for specific performance or a ground for rescission of the contract, S. 28 (a) requires that in order to be a valid defence, it must be so grossly inadequate (with reference to the state of things existing at the date of the contract) as to

be by itself or coupled with other circumstances evidence of fraud or of undue influence taken by the plaintiff.

If the case falls under any of the 3 clauses in S. 35. rescission is allowed even without the consent of the other side. There cannot be rescission of a part.

Cancellation of an instrument (Ss. 39-41).

This relief is granted by courts of equity on the principle of *quia timet* to prevent and avoid anticipated mischief or wrong : the reason being that if not so cancelled, the instrument would, after a lapse of time when the evidence of its voidable character is no more obtainable, perhaps be vexatiously used by one party against the other innocent party. The court has the discretion even to cancel an instrument in part and allow it to stand for the residue if the instrument evidences different rights and obligations ; it may, if it is necessary for the ends of justice, require the plaintiff to make compensation to the other party.

Essentials of relief. The plaintiff must prove

(a) That the instrument is void or at least voidable against the plaintiff.

(b) That he has reasonable apprehension of injury from the instrument if left outstanding.

(c) That the threatened injury is serious.

(d) That the case is such that the court ought to exercise its discretion to cancel the document.

Rescission can be ordered in case of contract being voidable only ; while cancellation can be had in any case, *i. e.*, whether the instrument is void or voidable ; and it is sufficient if there is a reasonable apprehension of the danger.

Declaratory decrees (S. 42)

S. 42 makes provision for a particular mode of relief, where there is no specific performance, no award of compensation but there is merely a declaration of the rights of parties. In such a suit the plaintiff need not ask for any further relief; but if the plaintiff being able to seek any further relief than a mere declaration of title omits to do so, the court shall not

pass any such declaration. The proviso to the section does not empower a Court to dismiss a suit merely because the plaintiff being able to seek further relief fails to do so; the Court can only refuse to make the declaration.

Such a decree is binding only on the parties to the suit and the persons claiming through them respectively, and where any of the parties are trustees; persons for whom they are trustees. There can be no execution of a mere declaratory decree.

In order to get a declaratory decree it is necessary that:—

(1) There must be a present existing interest, however distant the possibility of its coming into actual possession and enjoyment may be: a mere contingency however proximate and valuable, if by virtue of it, there is no present state or interest, will not suffice.

(2) There must be some present danger or detriment to such interest to be avoided by the declaration; it must not have been sought on merely speculative grounds.

(3) A man who is able to seek further relief than a mere declaration of title cannot be allowed a declaratory decree only, if he omits to seek that further relief.

Even if the 3 essentials mentioned above are present, the decree cannot be claimed as a matter of right; it is discretionary with the Court.

Appointment of receivers (S. 4).

This is a relief meant for the protection of property. A receiver can be appointed of any property moveable or immoveable, e. g., shares in companies, lands, inam villages, stock in trade, &c, According to Civil Procedure Code if it appears to the court necessary for the perservation, better custody, or management of property, it may appoint a person a receiver of the property "subject matter" of the suit; but such appointment is indispensable whenever there is danger of the property being converted to other purposes or reduced or lost by gross negligence. These powers are to be exercised by the Court with a sound discretion upon a view of all the circumstances which are connected with the right asserted and which has to be established.

A receiver is liable for loss occasioned to the property by his wilful default or gross negligence. He stands in a peculiar position for in his case want of ordinary diligence would be taken as amounting to gross negligence.

To protect the property in his hands against loss, security is generally taken from the receiver. He has to account for what he receives in respect of the property and pass his accounts at such period and in such form as the court directs.

Mandamus (Ss. 45-51).

Ss. 45-51 lay down a string of rules governing the jurisdiction of the courts in enforcing performance of public duties and the procedure for such a relief.

Any of the High Courts at Fort William, Madras and Bombay, can make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction by any person holding a public office, temporary or permanent, or by any corporation or any inferior court of Judicature. Such act or forbearance must be clearly incumbent on such public officer or court or corporation under any law for the time being in force and must in the opinion of the High Court be consonant to right and justice. Further the applicant (to the satisfaction of the court) must have no other specific and adequate legal remedy and the remedy given by the order applied for must be such as would be complete.

The application must have been made by some person whose property, franchise or personal right would be injured by the forbearing or doing of the said specific act. It must be founded on affidavit of the person injured, stating his right in the matter in question, his demand of justice, and the denial of his right.

Procedure—The High Court may make the order absolute in the first instance or refuse it or grant a *rule nisi* to show cause why the order applied for should not be made or it may make an order in the alternative ; lastly if no cause is shown it may make a final peremptory order to do the act or forbear from it absolutely. The costs are in the discretion of the Court. An appeal lies from such an order.

The High Court cannot under S. 45 make any order binding on the Government *i. e.*, Secretary of state, Viceroy and Governors of Madras or Bombay, Governor of Bengal; nor make an order on any servant of the Crown as such merely to enforce the satisfaction of a claim upon the Crown.

The application ought not to be premature nor unreasonably delayed. An impossible act will not be ordered.

Preventive relief (S 53).

Preventive relief is granted by an injunction enjoining the other party to refrain from doing which he is under an obligation not to do. It is entirely at the discretion of the court; an injunction may be temporary or perpetual as also mandatory. It is a mode of specific performance of negative agreements.

Difference between temporary and perpetual injunction.

A temporary injunction is provisional in its nature continuing until a specified time or until the further order of the court; but it does not conclude a right. It can be granted at any period of suit even *ex parte* without a notice to the other party to show cause why it should not be granted. It remains in force till the date of hearing, if not dissolved before that date. In India the grant of temporary injunctions is regulated by Civil Procedure Code: its object and effect is to preserve the property in dispute in *status quo* until the final disposal of the case. A perpetual injunction on the other hand, can only be granted by a decree made at the hearing and upon the merits of the case; it is granted when a right is established and it then follows that no obstruction can be made or repeated in future by the other party claiming under an adverse title. The defendant is by such an injunction perpetually restrained from the assertion of a right or from the commission of an act which would be contrary to the right of the plaintiff.

Perpetual injunction when granted (S. 54),

It may at the discretion of the court be granted to prevent the breach of an obligation existing in favour of the applicant. In case of contracts the provisions of Ss. 12 to 29 guide the grant of the injunction. The jurisdiction of a court of Equity

to issue an injunction in cases of contracts is co-extensive with its jurisdiction to decree specific performance. If the contract is not specifically enforceable, the court will not by way of injunction restrain the breach thereof; but the remedy by injunction is in some cases available even where the remedy by specific performance is not granted; S. 54 gives the cases in which such an injunction is granted (case of Torts); if the defendant invades or threatens to invade the plaintiff's right to or enjoyment of property, *viz.*—

- (1) If the defendant is a trustee for the plaintiff.
- (2) Where there exists no standard for ascertaining the actual damage caused or likely to be caused by the invasion.
- (3) Where pecuniary compensation would not afford adequate relief.
- (4) Where it is probable that pecuniary compensation cannot be got for the invasion.
- (5) Where it is necessary to prevent a multiplicity of proceedings.

Injunction will be refused if it would operate oppressively or inequitably or contrary to the real justice of the case, where it is not the fit and appropriate mode of redress, where it would cause injury, where it is unreasonable, or where undesirable consequences might ensue.

Mandatory injunction (S. 55).

This is something positive in character as opposed to an ordinary injunction which is issued to a person merely to restrain him from breaking the contract or from invading a person's right to the enjoyment of property; or to preserve the property in *status quo* for a time.

When injunction will not be granted.

S. 56 of the Act gives general cases in which injunction is refused. In other cases even it is not obligatory on a court to give an injunction; it has to exercise its discretions regard being had to the merits of each case.

It will not be granted:—

- (1) To stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings.

(2) To stay proceedings in a court not subordinate to that from which the injunction is sought.

(3) To restrain persons from applying to any legislative body.

(4) To interfere with the public duties of any department of the Indian or Local Government or with the Sovereign Acts of a foreign Government.

(5) To stay any criminal proceedings.

(6) To prevent the breach of a contract the performance of which will not be specifically enforced.

(7) To prevent on the ground of nuisance an act of which it is not reasonably clear that it will be a nuisance; if the court is satisfied that the act complained of will inevitably result in a nuisance, it would interiere to restrain the act before the actual nuisance has been committed. No relief by way of injunction can be given for an imaginary or problematic injury.

(8) To prevent a continuing breach in which the person seeking an injunction has acquiesced. There should be no laches; if there is unnecessary inexplicable delay in applying for it, the maxim "delay defeats equities" prevails. Thus if a man's neighbour is building over his own land but in such a way as to infringe his rights of easement to light and air, the action must be brought at the earliest opportunity and if he waits till the whole bulding is completed, he will lose his right to the relief.

Acquiescence bars injunction but not the right to compensation.

(9) When equally efficacious relief can be had by other usual proceedings (except in the case of breach of trust).

(10) If the applicant does not come with clean hands, *i. e.*, if he is guilty of such conduct as disentitles him to the assistance of the court.

(11) When he (applicant) has no personal interest in the matter, *i. e.*, he is a nominal plaintiff, others having actual interest in the suit.

Restraining breach of negative covenants (S. 57).

(1) To entitle the applicant to an injunction restraining the breach of a negative covenant when the positive one cannot be specifically enforced, the following are the necessary essentials.

(2) (i) Agreement; (ii) divisible; (iii) the negative one may be express or implied; (iv) the applicant must not have failed to perform his part of the contract.

It is not necessary that the inability of the court to enforce specific performance of the affirmative part must have arisen in a particular manner.

The affirmative and negative covenants must be distinct and separate each of them should be substantive parts of the contracts. So if the negative clause is merely subsidiary or incidental to the affirmative part; the former will not be enforced by an injunction. This section is not subject to the provisions of S. 21, Cl. 9; under this section an injunction may be granted even in case of a contract of a longer duration even exceeding 3 years though it might not be capable of specific performance under S. 21.

Injunction to Restrain Libel.

An injunction is given at the hearing, *i. e.*, disposal of the suit generally. But it can be restrained by an interlocutory injunction when there is a clear case. It is only when there is a wholly unjustifiable and atrocious libel likely to cause irreparable injury to the applicant that the court would grant this remedy on an interlocutory application.

Light and air cases.

When a person builds so near the house of another so as to darken his windows against the clear right of the latter, either by contract, or by ancient possession, the court interferes by an injunction except where damages would be a substantial compensation. The only test followed is whether the amount of light left after the obstruction is such as would be sufficient for all ordinary purposes. All that is necessary is that there should not be an obstruction so as to materially reduce the amount of light accustomed to enter the place.

The mere fact that it is not sufficient for any purpose requiring ordinary light is not a ground for an injunction ; in such cases damages alone would be awarded. The same principles apply in India.

Nuisance.

It affords ground for civil action only if it causes special damage. No action can lie if the nuisance is legalised by Statute. A private nuisance is restrained only if the mischief is irreparable and is a constantly recurring grievance. The *test* is whether there is such an inconvenience caused which materially interferes with the ordinary comfort physically of human existence. In case of public nuisance the ordinary remedy is a criminal action. But under the new Civil Procedure Code of 1908 power is given to Advocate-General to move a Civil Court in case of a public nuisance for an injunction.

Trademark.

The question is how far the defendant's trademark bears such a resemblance to that of the plaintiff as to be calculated to mislead incautious purchasers ; as a matter of fact no one has the liberty to put his goods as those of a rival trader. It is sufficient if the resemblance is likely to deceive ; it is not necessary that any one should have been actually cheated ; mere possibility of deception is not enough ; there must be a probability verging affirmatively towards a certainty. Want of fraudulent intention is no defence.

Patent.

There is an infringement of patent only when a man uses directly or indirectly the invention which is the subject of the privilege or employs means only colourably different to produce the same result ; the identity must be not faint, but substantial. This is protected in India by Act 5 of 1888. The aggrieved person must show that his is a *new* invention of *utility*, and that he is the inventor, the specification must also be completely shown. Injunction is not a matter of right. If the patent is recent and not established, it must be established. In some cases the court refuses to issue an *interim* injunction resting satisfied with defendant's undertaking to account.

Copyright.

Registration is necessary (by the copyright Act). There is no copyright in an irreligious work or one which is libellous, immoral or obscene. It enures for the life-time of the author and 7 years after it, or 42 years from its publication whichever period be the longer. Injunction is given in case of piracy, *i. e.*, servile or evasive imitation of the original book ; *bona fide* abridgment or use of common materials or *bona fide* extract from the original is no piracy so as to be an infringement of the right. Test is:—Has there been a legitimate and fair exercise of mental ability, industry and discrimination resulting in the production of a new work ? But it would be an infringement if instead of searching into the common sources in an independant and critical manner an authour quietly and servilely avails himself of the labour of his predecessor and adopts his arrangement or does it with only colourable variations : The fact of appearance in the alleged copy of the same inaccuracies or blunders that are to be found in the first published work is piece of evidence to show piracy. There may be copyright in oral lectures or title of a book and in illustrations, headings, letters on literary subjects, or private matters or in unpublished manuscripts. There is no bar to challenging a second edition of a pirated work merely because the first one was allowed to pass.

APPENDIX B.

LEADING CASES.

Pusey v. Pusey. (*Specific Performance*).

Though in case of a contract relating to moveables the presumption is that a breach thereof can be compensated for by damages, a court of equity would decree specific performance if the chattel is of such a nature that the loss of it could not be adequately compensated, *i. e.*, could not be measured in money, *e. g.*, in case of articles of unusual beauty and rarity such as ancient curiosities, horns, alter-pieces with inscriptions, vases, heirlooms. In this case the defendant was made to deliver over the specific horn which in ancient times was delivered to the ancestors of the plaintiff to hold their land by ; in another case the plaintiff was on the same equitable grounds held entitled to the specific delivery to him of an old alter-piece made of silver remarkable for ancient inscriptions and dedication to the God Hercules. See S. 11. (b) ; S. 12.

Cuddee v. Rutter. (*Specific Performance*).

Another exception to the general rule as to specific performance stated in the above case is this—specific performance may be decreed even in case of agreements relating to personal chattels, only if they refer to sale of shares in a private undertaking ; but not if they are respecting the stock always available in the market, for then damages would afford full compensation. In this case the dispute was as regards the transfer for a certain sum of South Sea Stock, and it was held that there being no difference between such a stock and any other like sum of stock, there could be no specific performance. The remedy for non-performance being a suit for damages occasioned, which would be a sufficient compensation and adequately measurable by difference. If the stock were much limited in number, like shares of private companies, the result would be different.

Duke of Somerset v. Cookson.

Defendant was in possession of an article—which was a curious old silver shrine remarkable for a Grecian inscription and dedication to the God Hercules. It was held that the article was of too special a character to bear an ascertainable market-value and that the plaintiff was entitled to recover the same. The article was of such antiquity and curious workmanship that no other men would value it at the same price. See S. 11 (c).

Seton v. Slade. *Lapse of time, how far a defence to Specific Performance).*

At law, time used to be always held of the essence of the contract but in equity, time is deemed *prima facie* non-essential and the lapse of it is not allowed as a defence to a suit for specific performance except in the following cases:—

(1) Where it was of essence of the contract originally by express agreement or the nature of the case, or (2) where it was made so by subsequent notice, or (3) where its lapse is such as to constitute laches or abandonment. In this case the plaintiff has agreed to sell certain property to the defendant and to make out a good title in two months. Defendant gave him notice that if he did not do so his deposit should be returned with interest; the plaintiff delivered his abstract some days before the expiry of two months. The defendant kept it with him, and it was held that on the circumstances of the case the defendant purchaser could not insist upon time as of the essence of the contract so as to bar the suit for specific performance. In such a case the court would award compensation to the defendant for the plaintiff's failure to comply with the strict terms as to time. See Ss. 14 and 15 Specific Relief Act.

Woolam v. Hearn. *(Specific Performance with a variation.)*

Mistake of the defendant, if it would render specific performance a hardship, is a valid ground of defence to suit for specific performance. But evidence of such a mistake could be given. It was wholly inadmissible at law and was allowed to be offered in equity only, and that too not by the plaintiff,

but only by the defendant resisting specific performance. A plaintiff suing to compel specific performance could not; hence the equitable doctrine that "though a defendant resisting specific performance may go into parol evidence to show that by fraud the written agreement does not express the real terms, a plaintiff cannot do so for purpose of obtaining specific performance with a variation." This, though a general rule, is subject to some exceptions in which cases the plaintiff can obtain specific performance with a parol variation:—

- (1) Where the parol variation is in favour of the defendant, and the plaintiff offers to perform the agreement with a variation.
- (2) Where the defendant sets up a parol variation, and the plaintiff seeks specific performance of the agreement with the variation.
- (3) Where there have been acts of part performance of the parol portion, justifying a decree for specific performance in the case of an original agreement.
- (4) Where an omission has occurred by fraud (*Snell*).

This parol variation is allowed to be set up by the defendant in spite of the Statute of Frauds, for though the Statute says that an unwritten agreement shall not bind it, it does not expressly say that a written contract shall always necessarily bind. The principles laid down in the case have been followed in the leading case of *Lord Townshend v. Stangroom*, and introduced in the Specific Relief Act, S. 26.

Stapilton v. Stapilton.

One Philip Stapilton had two sons Henry and Philip; it was not certain whether Henry was a legitimate son. To prevent any disputes and controversies that might arise deeds of lease and release were entered into whereby Henry was to receive a part of the estate. After the death of the father and Henry disputes arose between Henry's son and Philip jr. and it was established that Henry the father was illegitimate,

but it was held that the deeds mentioned above were binding on the parties and so Henry's son was entitled to receive a part of the estate. An agreement entered into upon a supposition of right, or of a doubtful right, though it afterwards comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties ; for the right must always be on one side or the other ; and therefore, the compromise of a doubtful right is a sufficient foundation of an agreement. Where agreements are entered into to save the honour of a family, and are reasonable ones, a court of equity will, if possible, decree a performance of them.

This case has been often referred to and followed as the leading case on the question of " Family Arrangement." (See S. 23).

APENDIX C

NEW CASES.

Sec. 45.

The right to apply under Section 45 is made dependent on the injury to applicant's property, franchise or personal right.

Section 25 of Calcutta Municipal Act confers a right of claim on person whose name has been omitted from the preliminary roll. But a person whose name is included in preliminary list is not entitled to contest that another person's name is omitted from the list and that he standing as a candidate has been deprived of his vote. He is not entitled to mandatory injunction in nature of writ of mandamus. High Court's jurisdiction in the matter of the writ of mandamus cannot be taken away by an act of Provincial Legislature.

S. K. Sawday v. N. Shingha Roy and another. A. I. R. 1946 Cal 206

In a suit for a specific performance based on compromise decree, the defendants cannot attack the decree on the ground that leave of the Court was not obtained, by guardian while entering into contract on behalf of minor. Although a minor is not bound by a compromise decree on the ground that his guardian adlitem had not obtained leave of the court, decree is not void, and unless and until it is set aside, it is binding on minor.

Hashem Howladar and other v. Shreenath Mistri and others. A. I. R. 1946 Cal. 438.

Section 41.

Where a person during his minority sells his property to defendant and on attaining majority, in order to avoid payment of compensation, he and plaintiff enter into agreement to execute sale deed of the same property in plaintiff's favour and latter should sue for possession, Section 41 applies, and court has discretion to require plaintiff to make compensation to defendant as the justice of the case may require.

It is doubtful whether court has power to order refund in a suit where minor is the defendant.

Mahadeo Deoji and another v. Nana Banaji and another A. I. R. 1946 Nag. 359.

Section 27.

Where after entering into a contract for sale of certain property with the plaintiff, the vendor subsequently contracts to sell same property to defendant, in a suit by plaintiff under Sec. 27. the burden of proving good faith and want of notice is on defendant. By the law in India, an oral contract is valid and enforceable but in such a case, it is a question of construction, whether execution of a properly written contract is a condition or term of bargain or it is a mere expression of desire of the parties as to manner in which transaction already agreed to, will go through.

In this case, their Lordships held that there was sufficient evidence to prove that parties intended to be bound by oral valid contract and facts did not support inference that parties intended to be bound by only when formal agreement had been executed.

Shankarlal Narayandas Mundale v. The New Molussil Co. Ltd. and others.

A. I. R. 1946 Privy Council 97. (From Bombay.)=48 Bom. L. R. p. 456.
Section 45.

Enactment of Sec. 45 has not abolished Writ of Prohibition. Subject is entitled to both these remedies as alternative. An order of Collector acting under R. 75 A of Defence of India Rules and Section 15 of Defence of India Act, requisitioning immoveable property on the material gathered after proper inquiries is a judicial order, and if it is in excess of powers or without jurisdiction, it is amenable to jurisdiction of High Court to issue a writ of certiorari or prohibition.

Juggilal Kamal pat v. Collector of Bombay.

A. I. R. 1946 Bombay 231.

Section 42.

A simple suit for declaration that ordinance promulgated by G. O. is ultra vires cannot be maintained within meaning of Sec. 42—Similarly a suit for declaration that plaintiffs are not liable to be tried by court martial does not fall within

meaning of Sec. 42. Section 42 refers to declaration either in regard to property or in regard to legal character or it must be for establishment of status or legal character.

Subedar Shingara Singh v. Brigadar C. H. D. O. Callaghan and others A. I. R. 1946 Lah. 247

Suit for declaration that U. P. Tenancy Act 1936 was ultra vires of Provincial Legislature, is not maintainable.

Thakur Gagannath Baksh Singh v. The United Provinces A. I. R. 1946 (Privy Council 127.)

A declaration of a decree ought not to be made unless there is right to some consequential relief, which if asked for, would have been given by the Court, or under a declaration of right is required as a step to relief in some other court. A suit by a co-tenant for declaration is maintainable.

Mt. Munabai v. Mt. Sharada bai. A. I. R. 1946 Nag. 235.

Sec. 42.

A plaintiff cannot be given a mere declaration that he is sole trustee to the exclusion of defendant unless he applies for consequential relief of possession or injunction. But this is of no consequence when court has granted declaration that both are joint trustees.

Shei Prasad v. Ram Chandra Prasad A. I. R. 1946 Allahabad 362.

The grant of decree of specific performance is in discretion of court and if discretion has been judicially exercised, High Court will not interfere with the discretion of lower trial Court.

Section 27.

A decree for specific performance can be passed under Sec. 27(c) against a minor son on a contract entered into by his father as member of joint Hindu family, after his death.

Ramrao Shamrao v. Suganchandra and another. A. I. R. 1946 Nag. 139
Section 45,

Application by A under Sec. 45 for order directing public officer to forbear from acting upon order on ground that rule 75A is ultra vires and requisition order illegal is maintainable.

Tan Bug Taim v. Collector of Bombay. A. I. R. 1946 Bom. 217.

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